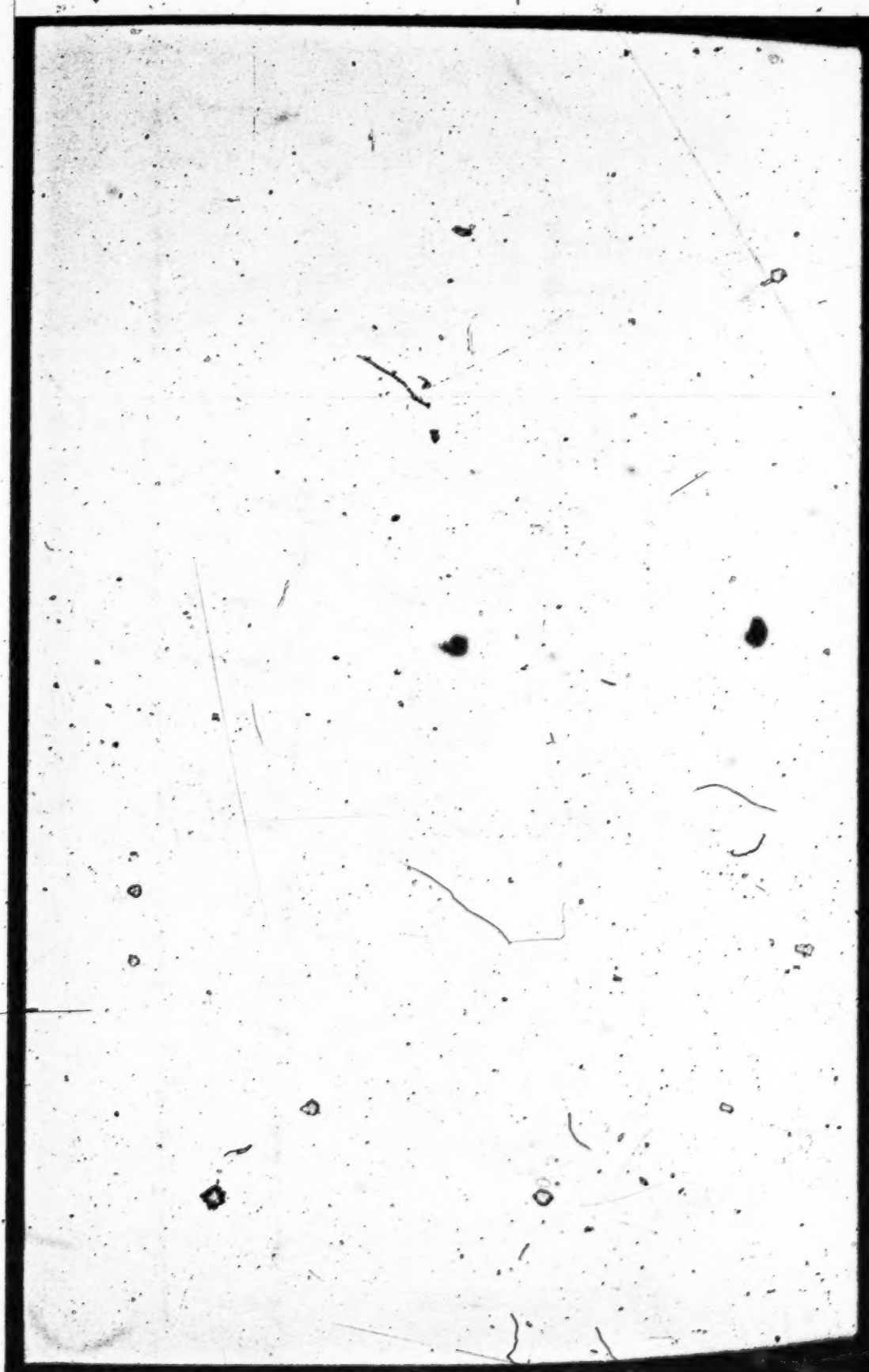

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IN THE

Supreme Court of the United States

October Term, 1968

No. 642

EDWARD BOYKIN, JR.,

Petitioner,

—v.—

STATE OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL OFFICE FOR THE RIGHTS OF THE INDIGENT, AS *AMICI CURIAE*

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BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL OFFICE FOR THE RIGHTS OF THE INDIGENT, AS *AMICI CURIAE*

Interest of the *Amici Curiae*

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Under its charter, one of its purposes is to provide free legal assistance to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel.[1] For many years, the

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[1] The Fund's charter was approved by a New York court, authorizing the organization to serve as a legal aid society. It is entirely independent of other organizations, and is supported by contributions from the public.

Fund's attorneys have represented in this Court and the lower courts persons charged with capital crimes, particularly Negroes charged with capital crimes in the Southern States.

A central purpose of the Fund is the legal eradication of practices in our society that bear with discriminatory harshness upon Negroes and upon the poor, deprived and friendless, who too often are Negroes. To further this purpose, the Fund in 1965 established a separate corporation, the National Office for the Rights of the Indigent (NORI), having among its objectives the provision of legal representation to the poor in individual cases and the advocacy before appellate courts of changes in legal doctrine which unjustly affect the poor.[2]

The long experience of Fund attorneys in the handling of death cases has led us to the view—confirmed by the studies of scholars[3] and more recently by empirical research undertaken under the Fund's auspices[4]—that capital punishment is administered in the United States in a fashion that consistently makes racial minorities, the deprived and downtrodden, the peculiar objects of capital charges, capital convictions, and sentences of death. Our experience has convinced us that this and other grave injustices are referable in part to fundamental characteristics of the death penalty as an institution in modern American society,[5] and in part to common practices in its

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[2] NORI's income has been initially provided by a grant from the Ford Foundation.

[3] See note 50 *infra*.

[4] See pp. 52-53 *infra*.

[5] See pp. 41-61 *infra*.

administration which depart alike from the standards of an enlightened criminal justice[4] and from the minimum

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[4] In virtually every State today, the death penalty is administered by a set of procedures which, to say the least, are strikingly unfair to the accused and likely to produce extreme arbitrariness in the selection of the men to be killed. We summarize those procedures:

(1) On voir dire examination, persons having conscientious scruples against the imposition of capital punishment are excused for cause from the trial jury. Of course, this Court's decision in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), disallowed one common form of "death-qualifying" capital juries. But *Witherspoon* has been given a very narrow reading by the state courts in its application to pre-*Witherspoon* trials, e.g., *State* v. *Mathis*, 52 N.J. 238, 245 A.2d 20 (1968); *Pittman* v. *State*, Tex Crim. App., No. 41,393, decided July 24, 1968; and death-qualification proceedings in forms not explicitly outlawed by the square *Witherspoon* holding have been practiced in virtually all of the state courts of which we are aware in trials held since *Witherspoon*. The immediate effects of this practice are several. First, it indirectly achieves what the States are forbidden directly to achieve: the systematic limitation of racial and other minority groups and of women—populations disproportionately characterized by death scruples. Second, it delivers over the administration of justice in trials for the most serious crimes known to our society, bearing the most serious penal exaction that human society can levy against a defendant, to an unrepresentative sub-group of the community, comprising its most punitive, ataviastic and uncompassioned members. Third, in the process of *voir dire* questioning by which the jury is death-qualified, it reinforces the very attitudes of punitiveness and uncompassion by which the jurors allowed to serve are natively characterized, driving home the message that any *principled*, ideologically-derived determination against the death sentence for the offense on trial is forbidden to the jury, and, indeed, that the attitudes of mercy and compassion which may undergird such a determination are legally disfavored and morally unfit.

(2) The capital case is then tried to the jury so selected, which determines both the question of guilt and that of punishment. Ordinarily, these two determinations are made simultaneously—by the traditional "single-verdict" procedure, as distinguished from the two-staged, "split-verdict" procedure used in a handful of jurisdictions. Under this single-verdict procedure, the jury hears

requirements of fairness and even-handedness fixed by the Constitution of the United States for proceedings by which

all the evidence bearing on guilt or on punishment *before* retiring to decide the guilt question, then returns with a single verdict which adjudges guilt or innocence and fixes the punishment for guilt at death or something less. There is no separate hearing on the question of sentencing, and no opportunity—other than the guilt trial—to present to the jury evidence of the defendant's character and background, pertinent to the death-life choice. At the guilt trial, the prosecution is usually forbidden to open up, in its case in chief, matters relating to the defendant's character and background. The defendant may open up the character question, subject to rebuttal by prosecution evidence of bad character, damningly prejudicial on the guilt determination. And, of course, the defendant may make a personal appeal for mercy—may personally address those persons who hold his life in their hands—only by taking the stand generally, thereby waiving the Privilege against Self-Incrimination. This is a practice that, as the Reporters of the Model Penal Code have noted, forces the capital defendant to a "choice between a method which threatens the fairness of the trial of guilt or innocence and one which detracts from the rationality of the determination of sentence." American Law Institute, Model Penal Code, Tent. Draft No. 9 (May 8, 1959), Comment to §201.6, at p. 74. Specifically, the defendant is whipsawed between his Constitutional Privilege and his right to present evidence that is requisite to rational sentencing choice. A defendant who believes that he has any chance of acquittal of a capital charge will often choose to avoid prejudicing that chance by expansion of the trial record into background and character matters that make him appear guilty—he will, in short, exercise the Privilege. Under single-verdict procedure, the result frequently is that capital sentencing is done by a jury that knows next to nothing about the person of the defendant, and has not even heard him speak in favor of his life.

(3) But the jury is not merely deprived of factual information essential to a reasoned sentencing decision. It is also deprived of any sort of legal standards or guidelines for making the decision. Under ubiquitous American capital trial procedure, the decision between the death penalty and lesser alternatives to it is required to be made by the jury in its unguided, unfettered and unreviewable discretion—according to whatever whims or urges may move it. This most momentous of human decisions is unlike any other made by a jury in a purportedly legal proceeding; it is not made pursuant to rules of law or within the limitations of any sort of regular, uniform or generalized doctrines or principles. Rather it

human life may be taken. Finally, we have come to appreciate that in the uniquely stressful proceeses of capital trials and direct appeals, ordinarily handled by counsel appointed for indigent defendants, many pressures and conflicts may impede the presentation of effective attacks on these unfair and unconstitutional[7] practices; and that

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is avowedly *ad hoc, ex post facto* and—because it neither does nor need respond to any rational conception of punishment or sanctioning—wholly arbitrary. Little wonder that, in the actual administration of capital sentencing, jurors have been shown to use this lawless discretion lawlessly, and to discriminate racially, for example, in sentencing men to death. See pp. 51-53 *infra*.

(4) The jury's sentencing decision is not ordinarily judicially revisable. It is, of course, subject to correction by the exercise of executive clemency; but this sort of gubernatorial dispensation is administered still more irregularly than the jury's decision itself. Procedures for the clemency determination are unformulated; standards to guide it are non-existent; and, by this stage, the condemned man is usually indigent, unrepresented and legally helpless. See note 8 *infra*. Political and other considerations nevertheless do bring about a substantial number of commutations; and, at the conclusion of the process of a Nation's administration of capital justice for any year, only a few random, arbitrarily selected men are put to death. Their executions are as futile and purposeless as they are unusual and arbitrary. For there is simply no evidence that capital punishment serves any legitimate end or purpose of the criminal law—deterrence, incapacitation, reformation—which lesser exactions do not; and the very strong weight of expert opinion vigorously denies that it does. See n. 53 *infra*. Whatever penal efficacy the death penalty might have if regularly, uniformly and fairly administered in all cases where it was allowed by law is nullified by its actual rare and haphazard application, see pp. 41-61 *infra*, with the result that the penalty is left altogether without redeeming social value.

[7] The specific constitutional claims to which the procedures described in footnote 6, *supra*, give rise may be briefly characterized as follows:

(1) The systematic exclusion of death-scrupled jurors under practices not condemned outright by *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), nevertheless offends the Constitution because (i) it deprives capital defendants of a trial by a jury that is a cross-section of the community, in violation of the Sixth Amendment and the Due Process and Equal Protection Clauses of the Four-

in the post-appeal period, such attacks are grievously handicapped by the ubiquitous circumstances that the in-

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tenth; and (ii) it results in a biased and prosecution-prone jury, unable to accord the defendant a fair trial on the issue of guilt, in violation of the Due Process Clause. See Petition for Certiorari, in *Forcella and Panicello* v. *New Jersey*, O.T. 1968, No. 947 Misc., pp. 69-74, 80-85.

(2) The practice which commits the sentencing decision in capital cases to the undirected, unlimited and unreviewable discretion of the jury violates the rule of law basic to the Due Process Clause. See Petition for Certiorari, *Johnson* v. *Virginia*, O.T. 1968, No. 207 Misc., pp. 12-16; Petition for Certiorari, *McCants* v. *Alabama*, O.T. 1968, No. 937, Misc., pp. 15-20; Petition for Certiorari, *Maxwell* v. *Bishop*, O.T. 1968, No. 622, pp. 58-65. See also Part III, *infra*, of this brief.

(3) The single-verdict procedure whereby a trial jury in a capital case simultaneously hears evidence pertinent to guilt and to sentencing, and returns a single verdict speaking to both issues, is constitutionally deficient because (i) it compels the defendant to a choice between his constitutional right of allocution (and to present evidence requisite to rational sentencing choice) and his Privilege against Self-Incrimination, and (ii) it results in an unfair trial on either the guilt issue, or the sentencing issue, or both. See Petition for Certiorari, *Johnson* v. *Virginia*, *supra*, pp. 17-23; Petition for Certiorari, *Maxwell* v. *Bishop*, *supra*, pp. 65-74; Petition for Certiorari, *Mathis* v. *New Jersey*, O.T. 1968, No. 683 Misc., pp. 45-55.

(4) Capital punishment is a cruel and unusual punishment within the condemnation of the Eighth Amendment as incorporated into the Fourteenth, because (i) it involves brutal and unnecessary physical and psychological cruelty; (ii) is abhorrent to civilized standards of decency; and (iii) is justified by no rational purpose of society, at least where it is administered (iv) as a rare and unusual penalty, (v) invoked in the unconfined, uninformed and arbitrary discretion of the sentencer, and (vi) under procedures which fail to assure considered and rational judgment by the sentencer of circumstances in mitigation and the absence of circumstances in aggravation that would render imposition of the death sentence cruel and unusual on the facts of particular cases. These issues, in contention in several litigations in the lower courts, are of course broader than those discussed in Part II, *infra*, of this brief.

(5) In many States, it can be empirically demonstrated that sentencing juries have utilized the unfettered discretion given them in capital sentencing by discriminating racially in the imposition of

mates of the death rows of this Nation are as a class impecunious, mentally deficient, unrepresented and therefore legally helpless in the face of death.[4] Common state prac-

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death sentences. In these States, where there can be shown a long-continued pattern and practice of applying the sentence of death with extreme disproportionate frequency against Negro defendants convicted of offenses (particularly rape) against white complainants or victims, such Negro defendants are denied the equal protection of the laws guaranteed by Rev. Stat. §1977 (1875), 42 U.S.C. §1981 (1964), and by the Fourteenth Amendment. See Petition for Certiorari, *Maxwell* v. *Bishop; supra*, pp. 9-33, 35-58.

[4] Recently, in connection with the case of *Adderly* v. *Wainwright*, M.D. Fla., No. 67-298-Civ-J, described *infra*, Fund lawyers were authorized by federal court order to interview all of the condemned men on death row in Florida. The findings of these court-ordered interviews, subsequently reported by counsel to the court, indicated that of 34 men interviewed whose direct appeals had been concluded, 17 were without legal representation (except for purposes of the *Adderly* suit itself, a class action having as one of its purposes to declare their constitutional right to the appointment of counsel); 11 others were represented by volunteer lawyers associated with the Fund or the ACLU; and in the case of two more, the status of legal representation was unascertainable. All 34 men (and all other men interviewed on the row) were indigent; the mean intelligence level for the death row population (even as measured by a nonverbal test which substantially overrated mental ability in matters requiring literacy, such as the institution and maintenance of legal proceedings) was below normal; unrepresented men were more mentally retarded than the few who were represented; most of the condemned men were, by occupation, unskilled, farm or industrial laborers; and the mean number of years of schooling for the group was a little over eight years (which does not necessarily indicate eight grades completed). These findings parallel both those of scholars who have undertaken to describe the characteristics of the men on death row, e.g., Bedau, *Death Sentences in New Jersey 1907-1960*, 19 Rutgers L. Rev. 1 (1964); Johnson, *Selective Factors in Capital Punishment*, 36 Social Forces 165 (1957), and of officials experienced in dealing with death-row inmates, e.g., DiSalle, *Comments on Capital Punishment and Clemency*, 25 Ohio St. L.J. 71, 72 (1964): "I want to emphasize that from my own personal experience those who were sentenced to death and appeared before me for clemency were mostly people who were without funds for a full and adequate defense, friendless, uneducated, and with mentalities that bordered on being defective." *Accord*: Lawes, Twenty Thousand Years in Sing Sing (1932)

tice makes no provision for the furnishing of legal counsel to these men.[9]

For these reasons, *amici* Legal Defense Fund and NORI have undertaken a major campaign of litigation challenging the death penalty as a cruel and unusual punishment, and assailing on federal constitutional grounds several of the most vicious common practices in its administration.[10]

302, 307-310. And even within this deprived group, racial minorities are the objects of especial deprivation. It has been found, for example, that Negroes are significantly less able than whites to procure the stays necessary for pursuit of legal remedies (as measured by median time between sentence of death and execution), McCafferty, *The Death Sentence, 1960,* in BEDAU, THE DEATH PENALTY IN AMERICA (1964) [hereafter cited as BEDAU], 90, 95-96, one factor that doubtless contributes to the significantly greater success of whites than Negroes in having death sentences commuted, e.g., Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row,* 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962).

[9] Just last month, in a litigation presented by Fund attorneys claiming the right of indigent condemned men to assistance of counsel during the post-appeal period, the Supreme Court of California "determined that the appointment of counsel to represent indigent defendants in capital cases in all proceedings between the termination of their state appeals and their execution, such as petitions for certiorari, habeas corpus petitions to state and federal courts, applications for executive clemency and the conduct of sanity hearings where indicated, will best serve the cause of justice, the interests of the defendants and this court. Counsel will be appointed routinely in the future in all such cases as a matter of policy." *In re Anderson and Saterfield,* Cal. S.C., Crim. Nos. 11572, 11573, decided November 18, 1968, p. 24b, *infra.* In New Jersey, the State Public Defender has announced his obligation to provide similar representation for all indigent condemned men in that State. See the Petition for Certiorari, in *Forcella and Funicello v. New Jersey,* O.T. 1968, No. 947 Misc., p. 5, n. 1. We know of no other State in which adequate provision is made for the post-conviction representation of indigent condemned men.

[10] See the Brief *Amicus Curiae* of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, in *Witherspoon v. Illinois,* O.T. 1967, No. 1015 and *Bumper v. North Carolina,* O.T. 1967, No. 1016, pp. 12-14 n. 30.

Fund and NORI attorneys, with the cooperation of other lawyers, instituted class actions on behalf of the approximately 60 condemned men on death row in Florida (*Adderly* v. *Wainwright*, M.D. Fla., No. 67-298-Civ-J) and the more than 80 condemned men on death row in California (*Hill* v. *Nelson*, N.D. Cal., No. 47318; *In re Anderson and Saterfield*, Cal. S.C., Crim. Nos. 11572, 11573), which have resulted in interlocutory class stays of execution for all men under sentences of death in both States.[11] In addition to the 140 inmates represented in these class actions, our attorneys have major responsibility for handling almost half a hundred pending cases of men sentenced to death in ten other States, and are cooperating with, or providing services to, attorneys handling half a hundred more across the country. Counsel for *amici* have pending on petitions for certiorari in this Court, *inter alia*, the following death cases: *Maxwell* v. *Bishop*, O.T. 1968, No. 622; *Johnson* v. *Virginia*, O.T. 1968, No. 307 Misc.; *Mathis* v. *New Jersey*, O.T. 1968, No. 683 Misc.; *McCants* v. *Alabama*, O.T. 1968, No. 937 Misc.; *Forcella and Funicello* v. *New Jersey*, O.T. 1968, No. 947 Misc. In each of these cases, at least one issue involved in the present *Boykin* case is presented.

The issues raised in *Boykin* are of literally vital significance to the more than 400 men on death row in the

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[11] On November 18, 1968, the California Supreme Court delivered its opinions in the *Anderson and Saterfield* cases, rejecting by a 4-3 vote all federal constitutional attacks on the death penalty in California. The court vacated Anderson's and Saterfield's death sentences for constitutional error in the selection of their trial juries under *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), however; and its previously issued stay of execution for all condemned men in the State remains in effect at this date. See Appendix B *infra*.

The numbers of condemned men in California and Florida are given as of this time, not as of the time of initiation of the respective lawsuits.

United States, an increasing number of whom (now amounting to over half their total number) we directly or indirectly represent. The lives of each of these men may well turn on what the Court decides and says—or does not decide or does not say—in the present case. For this reason, we respectfully present on their behalf our views upon the case before the Court. The parties have consented to the filing of this *amicus curiae* brief, and copies of their letters of consent will be submitted to the Clerk with the brief.

Opinions Below

The several opinions of the Justices of the Supreme Court of Alabama affirming by a divided court Edward Boykin's conviction and sentence of death are reported at 281 Ala. 659, 207 So.2d 412. They are found in the Appendix [hereafter cited App. ....] at 36-41.

Jurisdiction

The judgment of the Supreme Court of Alabama was entered on February 8, 1968, App. 42. Rehearing was denied by order of March 7, 1968, App. 43. The petition for certiorari was filed on June 4, 1968, and was granted by order of October 14, 1968, App. 46. Jurisdiction of this Court rests on 28 U.S.C. §1257(3) (1964).

Questions Presented[12]

1. Whether the Supreme Court of Alabama erred in affirming Boykin's capital conviction and sentence of death upon a guilty plea, where the record does not reflect that the trial court made appropriate inquiry to assure that the plea was voluntary and understanding as required by the Fifth and Fourteenth Amendments?

2. Whether Boykin's sentence of death for the crime of simple robbery, upon this record, violates the prohibition against cruel and unusual punishments contained in the Eighth and Fourteenth Amendments?

3. Whether Alabama's practice of permitting the trial jury absolute discretion, uncontrolled by standards or directions of any kind, to choose between the punishments of death or imprisonment for the crime of robbery violates the rule of law fundamental to the Due Process Clause of the Fourteenth Amendment?

Constitutional and Statutory Provisions Involved

The case involves the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States.

It also involves CODE OF ALABAMA, tit. 14, §415 (1959), which is as follows:

> "Any person who is convicted of robbery shall be punished, at the discretion of the jury, by death, or by imprisonment in the penitentiary for not less than ten years."

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[12] At pp. 69-73 *infra*, we note several other issues that may appear to lurk in the case but are not, in our judgment, presented by it.

Statement

Edward Boykin, Jr., was charged in five separate indictments, filed in the Circuit Court of Mobile County, Alabama, with the crime of robbery. App. 1, 36. Under Ala. Code, tit. 14, §145 (1959), set out at p. 11, *supra*, simple robbery is punishable by death or by imprisonment for not less than ten years, in the discretion of the jury. Section 415 fixes the penalty for the crime of robbery but does not define it; the elements of simple robbery are defined in Alabama by the common law.[11] Pursuant to the common-law definition, each indictment charged Boykin with feloniously taking a sum of money from the person of a named complainant against the complainant's will, by violence to the complainant's person or by putting the complainant in such fear as unwillingly to part with the money. App. 1.

July 11, 1966, Boykin was interrogated by the court and found to be unrepresented and indigent. He said he did not want counsel, but the court deemed counsel necessary and appointed a lawyer. App. 2-3. July 14, Boykin appeared with appointed counsel for arraignment on the five robbery charges, pled guilty to each, and was remanded for sentencing. The minute entry for this date consists of eleven lines reciting his appearance, the presence of his lawyer, and his plea. App. 4. Unlike the minute entry of July 11, it does not reflect that Boykin was addressed or questioned by the court, or that he said a word.

September 30, 1966, Boykin's five robbery charges were presented to a jury for trial and sentencing on his guilty pleas. App. 4-5. The prosecution presented seven witnesses who testified concerning the events of five robberies com-

[11] See *Morris* v. *State*, 97 Ala. 82, 12 So. 276 (1893); *Higgs* v. *State*, 113 Ala. 36, 21 So. 353 (1897); *Tanstill* v. *State*, 33 Ala. App. 460, 34 So.2d 857 (1948).

mitted in Mobile between April 23 and May 8, 1966. Each identified Boykin as the robber. In each of the five robberies, Boykin was apparently armed with a gun. Three times he had an accomplice; twice he did not. Three times he did not fire his gun; once he fired a warning shot that hit no one; once he fired a shot that ricochetted and hit a girl in the leg. The sole witness to this last episode testified that she did not think Boykin intended to shoot the girl. App. 20, 21. The amounts taken in the robberies ranged from $140 to $373.[14]

In general, the prosecution witnesses gave terse eyewitness descriptions of the several robberies. Cross examination was minimal. The defendant did not testify and presented no witnesses. No evidence was proffered or received relating to the defendant's character or background. In short, the jury knew nothing about Edward Boykin except his conduct during five robbery episodes, each lasting a few minutes, occurring within a period of about two weeks. The court's entire charge was as follows:

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[14] The five robberies were as follows:

On April 23, the Dairy Castle was robbed. Witnesses were Mr. Smith (App. 22) and Mr. Hersh (App. 24). About $209 was taken. The robber was alone. He had a gun, did not fire it.

On May 3, a service station was robbed. Witness was Mr. Pugh (App. 29). About $158 was taken. The robber had an accomplice. He had a gun, did not fire it.

On May 5, a general store was robbed. Witness was Mr. Campbell (App. 25). About $140 was taken. The robber had an accomplice. He had a gun, did not fire it.

On May 6, a drug store was robbed. Witness was Mrs. Fawcett (App. 16). About $363 was taken. The robber had an accomplice. He had a gun, fired a shot which ricochetted from the floor and hit a girl in the leg. Mrs. Fawcett thought the shot was fired to frighten, without intention to hit the girl.

On May 8, Pak-a-Sak was robbed. Witnesses were Mr. Loper (App. 11) and Mr. Weaver (App. 13). About $262 was taken. The robber was alone. He had a gun, fired a warning shot in leaving. The shot struck the ceiling, fell back hitting no one.

"THE COURT: Some of you gentlemen were on the jury yesterday, but I've got to briefly restate the law as to what robbery is. This defendant has plead guilty to robbery in five separate and independent cases. Now robbery, once again gentlemen, is the felonious taking of money or goods of value from another against his will and without his permission by violence or by putting him in fear. That boils it down in a nut shell just what robbery is. Now, it carries from ten years minimum in the penitentiary to the supreme penalty of death by electrocution. I'll have the forms for you in just about one minute. One form has been written up here. If you decide not to give death by electrocution, of course, the form on the indictment you can use that. On the other hand, gentlemen, there will be a form—I'll send it to you in the jury room—where if the jury finds the defendant guilty of the offense of robbery as charged in the indictment and fixes the penalty at death by electrocution. You will have that form. You can use either one form or the other when you arrive at your verdict." (App. 32.)

When it arrived at its verdict, the jury used the death forms. It thereby found Edward Boykin guilty of five robberies and sentenced him severally to die for each. App. 32-33. Judgment of five death sentences was entered. App. 4-5, 33.[15]

On appeal, the Supreme Court of Alabama affirmed the death sentences. An opinion having the concurrence of

[15] This judgment of September 20 was technically defective, in that the judge "inadvertently" failed to fix the execution date as required by law. App. 34. Accordingly, the sentence was set aside the same day, App. 5-6, and Boykin was resentenced on September 21, App. 6-8, 34-35. The proceedings on this latter date were formal and added nothing of substance to what had gone before.

four Justices rejected Boykin's claim that he had been subjected to cruel and unusual punishment forbidden by the federal Constitution. App. 36, 37-39. The opinion made mention of none of the other federal claims urged in Boykin's behalf. Three Justices dissented and voted to reverse the five judgments of death because the record did not show that Boykin's plea of guilty to five capital charges had been made knowingly and understandingly. App. 40-41. A fourth Justice, whose concurrence was necessary to the affirmance, addressed this issue in a separate opinion which expressly denied that "when a defendant pleads guilty in a capital case the record must affirmatively show that the trial judge did not accept the guilty plea until after determining that the plea was voluntarily and knowingly entered and that the defendant fully realized and was competent to know the consequences of such a plea." App. 39-40. The plurality opinion for affirmance did not discuss this point.

ARGUMENT

I.

The Supreme Court of Alabama Erred in Affirming Boykin's Convictions of Five Capital Offenses and Five Death Sentences Upon a Guilty Plea, Where the Record Does Not Show That the Trial Court Made Constitutionally Requisite Inquiry to Assure That the Plea Was Voluntary and Understanding.

The issues of widest importance in this case, and those in which *amici* are principally interested, are the questions whether Edward Boykin's sentence of death for simple robbery violates the Eighth and Fourteenth Amendment prohibition against cruel and unusual punishments (discussed in Part II, *infra*, of this brief), and whether its imposition in the unfettered discretion of a jury, which was empowered by Alabama law to choose between the penalties of death and imprisonment arbitrarily, capriciously, for any reason, or for no reason, violates the rule of law basic to the Due Process Clause (discussed in Part III, *infra*). We must note at the outset, however, that in our view the judgment of conviction and sentence below cannot be sustained on this record consistently with the Constitution, and that reversal is required for a reason quite independent of the two important issues presented relating to the validity of the death penalty. That reason may be briefly stated: the record below does not show compliance with requirements of the Fifth and Fourteenth Amendments in the taking of Boykin's guilty plea.

Three days after the first appointment of counsel, this indigent defendant was arraigned on five separate capital charges and pleaded guilty to all of them. These circumstances alone are cause for the gravest concern. In the

absence of some deal or understanding that excludes the death penalty, it is simply inconceivable that—on three days total time to investigate five distinct robbery charges—a plea could be entered which exposes the defendant to electrocution. One cannot say, and cannot imagine, what could have been in the mind of Boykin or his appointed lawyer. The record contains not one word concerning the circumstances of the plea, except that Boykin was in court and also "Thereupon in open court on this day, Defendant's Attorney, Evan Austill, was in court." App. 4. No inquiry was put on the record as to whether the plea was entered understandingly or ignorantly, freely or under inducement. The inference is strong that no such inquiry was made, for the minute entry reciting Boykin's plea reflects no interrogation of the defendant by the court, while a similar minute entry on the occasion of Boykin's earlier appearance for appointment of counsel relates in detail questions put by the court and answers by Boykin. App. 2-3, 4. On the date of his plea, there is no indication that the court addressed Boykin, or that he himself said anything. For aught that appears, the judicial confessions by which his life became forfeit were made on his behalf without his personal participation. Cf. *Brookhart* v. *Janis*, 384 U.S. 1 (1966). As this Court said in another connection: "To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process a meaningless symbol." *Chambers* v. *Florida*, 309 U.S. 227, 240 (1940).

We submit that the Constitution will brook no such summary procedure for the taking of a guilty plea in a capital case. Boykin's plea constituted, of course, a waiver of his rights to contest guilt and to insist that the prosecution prove him guilty at a trial. These are federal rights, secured by both the Fifth Amendment Privilege against Self-Incrimination and the Fourteenth Amendment guarantee of

due process. See *United States* v. *Jackson*, 390 U.S. 570 (1968); *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116 (1956); *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948). The question of their effective waiver is therefore governed by federal standards. E.g., *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *O'Connor* v. *Ohio*, 385 U.S. 92 (1966). Those standards are designed to give adequate and practical protection to the underlying federal right—protection which requires, in the case of the guilty plea, assurance that the plea is understanding and voluntary. E.g., *Waley* v. *Johnston*, 316 U.S. 101 (1942); *Machibroda* v. *United States*, 368 U.S. 487 (1962); and see *Shelton* v. *United States*, 356 U.S. 26 (1958) (mem).

Miranda v. *Arizona*, 384 U.S. 436 (1966), exemplifies the procedural protections with which this Court has surrounded the Privilege and which govern its waiver: Significantly, *Miranda* holds that a prosecutor cannot introduce an accused's station-house confession until the prosecution has affirmatively spread on the record all of the prerequisites for a valid waiver of the Privilege. This holding marked an enlargement of the accused's safeguards in the station house, but it was no constitutional innovation. Well before *Miranda*, the Court had insisted that the waiver of federal constitutional rights in *judicial* proceedings appear affirmatively on the record. *Carnley* v. *Cochran*, 369 U.S. 506 (1962); *Doughty* v. *Maxwell*, 376 U.S. 202 (1964) (mem). That rule continues to be applied. See *Swenson* v. *Bosler*, 386 U.S. 258 (1967); *Burgett* v. *Texas*, 389 U.S. 109, 114-115 (1967); *Mempa* v. *Rhay*, 389 U.S. 128 (1967) (Mempa's case).

Specifically, *Carnley* v. *Cochran*, *supra*, declares that: "Presuming waiver from a silent record is impermissible." 369 U.S. at 516. If that is true of the Sixth Amendment right to counsel involved in *Carnley*, it must be equally true

of the Fifth and Fourteenth Amendment rights surrendered by a guilty plea. The reasons, in each case, for requiring that the circumstances relied upon to constitute a waiver of vital federal rights appear affirmatively on the record are the same. For where either a waiver of counsel or a guilty plea is received in open court, only the affirmative assumption by the trial judge of responsibility to bring out the facts surrounding the waiver or the plea can protect the accused's constitutional interests. This is so because in both cases the very circumstances that would render the waiver or the plea unconstitutional—ignorance, incomprehension, coercion, terror, inducements—would also operate to cover up any appearance of unconstitutionality, and to stifle the accused's ability to complain of it.

It is no accident that this Court has repeatedly stressed the affirmative duty of a trial judge to make adequate inquiry of the accused before accepting a waiver of counsel. "This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938); *Von Moltke* v. *Gillies*, 332 U.S. 708, 722-723 (1948) (plurality opinion); *Carnley* v. *Cochran*, *supra*, 369 U.S. at 514-515; *Westbrook* v. *Arizona*, 384 U.S. 150 (1966). No less stringent duty, surely, devolves upon the judge taking a guilty plea. "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." *Glasser* v. *United States*, 315 U.S. 60, 71 (1942). In a guilty-plea case, the plea *is* the trial, and special considerations call for the court's special solicitude.

In the first place, an accused who enters a plea wants it to be accepted—whether or not this desire is the product of ignorance, inducements or fears. It is not then in his interest, nor that of his lawyer, to raise matters which will

arouse suspicion, and possibly "queer" the taking of the plea. Unless the judge makes affirmative inquiry, no protection is afforded the accused by the proceeding.

Second, the plea is the be-all and the end-all of the accused's right to defend. Once it is accepted, his guilt is determined; and the only remaining question concerning the guilt determination is whether the plea was valid. On this dispositive question, the accused has the right to an adequate record, and to such appellate review as the State affords. Denial of an adequate record for review would itself be a denial of due process. *Garner* v. *Louisiana*, 368 U.S. 157, 173 (1961); *Specht* v. *Patterson*, 386 U.S. 605, 610 (1967). But, as a practical matter, for the reasons we have stated no such record can be made unless the presiding judge undertakes to make it.

We do not say that a plea of guilty could not constitutionally be taken in traffic court in the manner in which Boykin's plea was taken. The matter would be more questionable if the plea were to a minor misdemeanor. But in a capital case, surely, fitting federal standards for the waiver of the federal right to contest guilt demand something more. For, as this Court recognized in *United States* v. *Jackson*, 390 U.S. 570 (1968), the pressures of a capital charge exert unique stress on the accused to waive his rights upon the inducement, or in the mistaken hope that he will thereby avoid the death sentence. Also, it can hardly be denied that what is at stake for the accused facing death demands the utmost solicitude of which courts are capable. More than ordinary care in the handling of death cases has long been the constitutional rule. For its varying exemplifications, see, e.g., *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Hamilton* v. *Alabama*, 368 U.S. 52 (1961); *Stein* v. *New York*, 346 U.S. 156, 196 (1952). "The differentiation between capital and non-capital offenses is the basis for dif-

ferentiation in law in diverse ways in which the distinction becomes relevant." *Williams* v. *Georgia*, 349 U.S. 375, 391 (1955). We submit that it is plainly relevant where a judge takes an accused's guilty plea to five capital charges with no more concern for his protection than would attend a plea to a vehicle-code violation.

We might add—although we think the point hardly necessary—that there is demonstrably nothing to be said *against* a requirement that a judge who takes a capital plea in open court must establish on the record the prerequisites to its validity. Objectors to *Miranda* have complained, at least, that legitimate police investigative practices were impeded by the rules laid down in that decision. But no one has ever supposed that it is a legitimate judicial practice, or one in the interest of the State, to take ignorant or involuntary pleas of guilty in a death case. There is, indeed, hardly even an interest of convenience in permitting the judge to take his pleas without inquiry, for inquiry is a simple enough matter in most cases. Here it might well have taken little longer than the time consumed by the court's belated and futile inquiries: "do you have anything to say as to why the sentence should not be imposed," repeated five times at the prosecutor's instance just before the entry of the five judgments of death that capped Edward Boykin's unexamined plea. App. 34-35.

For all of these reasons, we submit that the three dissenting Justices below were plainly right, as a matter of federal constitutional law, in concluding that the "judgments in these five death cases should be reversed and the causes remanded to the trial court because the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty." The plurality opinion below does not speak to the point, and the only explanation for the affirmance by the Supreme Court of Alabama on this record is that offered in the special concurring opinion

of Justice Lawson. App. 39-40.[16] Justice Lawson rejects the view of the dissenters because they "presume that the trial judge failed to do his duty." App. 40. Unhappily, it is in the nature of a silent record that one can draw conclusions from it only by presuming one thing or another; and the contrary presumption—that the trial judge did do his duty—is firmly foreclosed by *Carnley* v. *Cochran, supra.*

Justice Lawson takes the position, alternatively, that there is no need for the trial judge who accepts a guilty plea to put on record his inquiries into the constitutional requisites of the plea because the defendant who complains of the plea can later "raise all of [his] . . . questions in a petition for writ of error coram nobis. In such a proceeding, of course, the petitioner would be required to produce evidence in support of his contentions." App. 40. We can see no virtue whatever to a plea-taking procedure that would cast the burden of determining the validity of guilty pleas entirely on the post-conviction courts. *Cf. In re Gault,* 387 U.S. 1, 58 (1967). But, however this may be, the principle proposed by Justice Lawson as a rule to govern waiver of Fifth and Fourteenth Amendment rights has two overwhelming vices which require its rejection here. First, even in a non-capital case it throws an unacceptable burden on the accused.

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[16] There seems to be no question that the issue was properly before the Supreme Court of Alabama. Four of the seven Justices of that court expressly addressed it on the merits, and the remaining three, who kept silent about it, did not suggest that it was not preserved. In the nature of things it is implausible to suppose, and therefore impermissible to demand, that a challenge to the validity of a guilty plea be made in the trial proceedings where the plea is taken. As we have said in the text, *supra*, the principal reason for imposing a constitutional obligation upon the presiding judge to inquire into the validity of the plea before accepting it is that the defense is in no position to object to the taking of a plea which—whether for valid or invalid reasons—the defendant and his lawyer are eager to have the court accept.

> "Nor is it an answer to say that he may counter such presumptions on collateral attack by showing —if he can—that he had not [validly waived his federal constitutional right]. . . . To cast such a burden on the accused is wholly at war with the standard of proof for waiver which we laid down in *Johnson* v. *Zerbst*. . . ." (*Carnley* v. *Cochran, supra,* 369 U.S., at 514.)

Second, it is indefensibly callous with regard to the peculiar plight of the capital accused. Alabama practice—like that in most States[17]—affords an indigent condemned man no right to the appointment of counsel beyond the stage of the direct appeal. There is therefore no assurance that a coram nobis or other post-conviction petition will ever be filed, or that the accused will survive long enough to file it. A man in Boykin's position, whose guilty pleas have never been examined by any court prior to the termination of his appeal, is promised an examination if, unaided, he can get a stay of execution and bring his claims to court, upon proper allegations, before the State kills him. We suggest that such a scheme is constitutionally intolerable.[18]

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[17] See notes 8, 9 *supra.*

[18] This Court need not now decide what would be the remedy if, in a post-conviction proceeding, a petitioner demonstrated that his plea of guilty to a capital charge was taken without the constitutionally requisite inquiry. See the decisions holding that, in federal post-conviction proceedings under 28 U.S.C. § 2255 (1964), a showing of non-compliance with Fed. Rule Crim. Pro. 11 in the taking of a guilty plea casts the burden of proof on the Government to show retrospectively that the plea was voluntary and understanding, but does not *per se* require the vacating of the plea. *Domenica* v. *United States,* 292 F.2d 483 (1st Cir. 1961); *Reed* v. *United States,* 291 F.2d 856 (4th Cir. 1961). The present case is before this Court not on collateral attack, but on direct review. If there was error below, by federal constitutional standards, as we submit there obviously was, the judgment of the Alabama Supreme Court affirming Boykin's conviction and sentence cannot stand, and must be reversed.

II.

Boykin's Death Sentence Offends the Eighth Amendment.

We come to the question whether Edward Boykin's sentence of death by electrocution for simple robbery violates the Eighth Amendment prohibition of cruel and unusual punishment.[19]

We venture to suggest that the answer to that question would appear easy enough to a student of Anglo-American history and contemporary culture, untrained in the law. If he were told that the Eighth Amendment contained a "basic prohibition against inhuman treatment," that its underlying concept was "nothing less than the dignity of man," that the Amendment was designed to assure that the state's punishing power "be exercised within the limits of civilized standards," and that "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," [20] we submit that he could only conclude the Eighth Amendment forbade court-ordered killings of human beings, long after their apprehension and incarceration, as a punishment for the crime of robbery in Twentieth Century America.

He would come to the same conclusion if he were told, less elegantly, that "the question inherent in the eighth amendment [is] is what the legislature has done, how-

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[19] That prohibition restrains the States by virtue of the Due Process Clause of the Fourteenth Amendment. *Robinson* v. *California*, 370 U.S. 660 (1962).

[20] The quoted passages are all from *Trop* v. *Dulles*, 356 U.S. 86, 100-101 (1958) (plurality opinion of the Chief Justice).

ever rationally supportable it may be, too offensive to stomach?" [21]

The considerations which would affect the thinking of our hypothetical non-legal scholar are not, of course, legally dispositive, but they are also not legally irrelevant. We enumerate a few of them as a means of framing systematically what we see as the legal nub of this case:

(1) Our scholar would look first at history; and, accustomed to the adage that the lessons of history are never clear, he would be surprised. For the lesson of Anglo-American history is clear beyond all mistaking that the advance of civilization has been marked precisely by the progressive abandonment of the death penalty. Our scholar would examine the course of England from the "bloody code" of the Eighteenth and Nineteenth Centuries to nearly total legal abolition in the mid-Twentieth, and the parallel history of the United States abutting, as we shall see, in virtually total abolition *de facto*.[22] Such an examination could only reinforce his intuitive sense

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[21] Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1076 (1964).

[22] Concerning the English experience, see PHILLIPSON, THREE CRIMINAL LAW REFORMERS (1923); RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 (1948); SCOTT, THE HISTORY OF CAPITAL PUNISHMENT (1950); TUTTLE, THE CRUSADE AGAINST CAPITAL PUNISHMENT IN GREAT BRITAIN (1961). Final abolition (except for a few obscure crimes for which the death penalty is not in fact used) came on October 28, 1965. See Dawtry, *The Abolition of the Death Penalty in Britain*, 6 BRIT. J. CRIM. 183 (1966).

Concerning the American experience, see BYE, CAPITAL PUNISHMENT IN THE UNITED STATES (1919); BEDAU, THE DEATH PENALTY IN AMERICA (1964) [hereafter cited as BEDAU], chaps. 1-2; Filler, *Movements to Abolish the Death Penalty in the United States*, 284 ANNALS 124 (1952). The most recent developments—legal abolition in Oregon, Vermont, Iowa, West Virginia, and (with some reservations) New York—are reported in Bedau, *The Issue of Capital Punishment*, 53 CURRENT HISTORY (No. 312) 82 (Aug. 1967).

that society's ceasing to use death as a punishment for crime is—in Albert Camus' phrase—"a great civilizing step." [23] Is this intuition not frankly obvious? Can anyone who thinks about it as a human being—(we postpone for a moment the more subtle task of legal judgment)—doubt the rightness of the same insight recently voiced by the Attorney General of the United States: "Surely the abolition of the death penalty is a major milestone in the long road up from barbarism"? [24]

(2) Our scholar would notice the history of thought as well as the history of events, and would be struck by the conceptions and ideals with which opposition to, and support for, the death penalty have respectively been long associated:

> ". . . the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries." [25]

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[23] CAMUS, *Reflections on the Guillotine*, in RESISTANCE, REBELLION AND DEATH (1961) 173 [hereafter cited as CAMUS], at 232.

[24] Statement by Attorney General Ramsey Clark, Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, on S. 1760, *To Abolish the Death Penalty*, July 2, 1968, Department of Justice Release, p. 2.

[25] SELLIN, THE DEATH PENALTY (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959) 15. This work is hereafter cited as SELLIN (1959).

(This is not to say, of course, that no one does or can support the death penalty for other reasons than belief in retribution, atonement or vengeance; but it is significant that these beliefs have been historically the mainstays of support for the institution of capital punishment, while the movement for abolition has been spearheaded by concerns derived from conceptions of "the dignity of man," *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion of the Chief Justice).)

(3) A related perception focuses upon the professional identification of those who have traditionally opposed, or supported, capital punishment:

> "In the first place, it will be noticed that, among the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favour the retention of capital punishment. The specialists of the social sciences, criminologists, sociologists, penologists, psychologists, doctors and writers on social science and criminology are, in their great majority, abolitionists. The supporters of capital punishment, apart from a number of political figures and persons holding high public office, are generally jurists with a traditional training and judges." (UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968) [hereafter cited as UNITED NATIONS] 64.[35]

(Again, we postpone for later discussion the complicated question *why* judges, particularly, as distinguished from students of the human sciences and of penology, should

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[35] *Accord: id.*, at 124; BEDAU 122-123; Louis J. West, M.D., "A Psychiatrist Looks at the Death Penalty," Paper Presented at the 122nd Annual Meeting of the American Psychiatric Association, Atlantic City, New Jersey, May 11, 1966 [hereafter cited as *West*], p. 2. And see KOESTLER, REFLECTIONS ON HANGING (Amer. ed. 1957) [hereafter cited as *Koestler*] 21-40.

be numbered strongly among the historical supporters of the death penalty.)

(4) Our suppositious scholar, of course, would also give attention to what is really involved in the execution of a human being. He would have in mind Arthur Koestler's admonition that the question of the cruelty of killing men is not one that gains clarity from being wrapped in abstractions.

> "You could hardly have a nobler example of the true function of words, namely the partial concealment of fundamentals. The phrase 'capital punishment' itself is a less obvious instance—less obvious because we have got so used to it. It means (in England) dislocating a man's neck by tying a six-foot rope around it and suddenly dropping him through a trap door with his arms and legs tied. If his neck happen not to break—it is certain at least to dislocate—then he would strangle, which takes longer and turns his face dark blue. In either case he often defecates, since people usually want to do this when they are frightened, and the huge shock to his nervous system when the rope tightens removes the last vestige of self-control, together with the social need for it.
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> "This is not a nice picture and few of us care to be reminded of it. Many of us can think calmly enough of capital punishment, because the phrase embodies what *The Times* would call 'a decent reticence.' The reticence has been growing decently for about a century, beginning in 1868 with the decision to hang people in private instead of making it a public spectacle." (KOESTLER & ROLPH, HANGED BY THE NECK (1961) 11-12.

Camus makes the point vividly: "The man who enjoys his coffee while reading that justice has been done would spit it out at the least detail." CAMUS 187.

In candor, we must say that this question of presenting the reality of capital punishment to the Court has given us deep concern in the writing of this brief. We would consider it both logically and legally absurd for the Court to deliberate the question whether Edward Boykin's death was a cruel and unusual punishment in terms of such decorous abstractions as "capital punishment" and "the death penalty." For a while we were inclined to append to the brief at the least a few descriptions of the methods of American executions by electrocution and by gas. (Lest the description just given by Koestler be thought wide of the mark, it should be recalled that the Royal Commission in 1953 recommended that England retain hanging as a means of legal execution, because it was more humane and certain than the American methods.[27]) But, as we prepared the materials for the appendix, we realized that their inclusion here would certainly cause us to be charged with sensationalism and an appeal to passion and repulsion. Such is the character of this institution of killing men that it forces one who attacks it legally either to describe with particularity what he is attacking, and be bitterly resented, or to keep silent about it, and risk being misunderstood. Finally, we have decided to join in the general "decent reticence," and to do no more than provide the Court with citations to descriptions of the methods of

[27] ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT (H.M.S.O. 1953) [Cmd. 8932] [hereafter cited as ROYAL COMMISSION] 246-261, particularly at 256.

executions.[28] Our hypothetical scholar would read these materials and he would conclude, with Dr. Louis J. West, that:

> "The killing of a helpless captive is a brutally degrading experience. If only those who have participated in an execution could vote on the death penalty, it would be abolished tomorrow." (*West*, at p. 2.)

(5) This last observation leads naturally to a connected one, the significance of our modern practice of secret executions, and to Justice Bok's trenchant question: "Why is the State so ashamed of its process that it must kill at dead of night, in an isolated place, and on an unnamed day?" Bok, Star Wormwood (1959) 197. Notwithstanding that virtually the only argument made in support of the death penalty in the Twentieth Century is its efficacy as a general deterrent (an argument which we shall later note is factually unfounded),[29] the men killed for deterrence's sake today are killed clandestinely, out of public

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[28] Duffy & Hirshberg, 88 Men and 2 Women (1962) 68-70, 100-106; Lawes, Life and Death in Sing Sing (1928) 162-190; McGehee & Hildebrand, eds., The Death Penalty (1964) 81-85; Di Salle, The Power of Life and Death (1965) 84-85; Eshelman, Death Row Chaplain (1962) 26-29, 101-104, 159-164; Chessman, Trial by Ordeal (1955) 195-202; Testimony of Clinton T. Duffy, in United States Senate, Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, Hearings on S. 1760, *To Abolish the Death Penalty* (unprinted Report of Proceedings, March 20, 1968) [hereafter cited as *Hearings*], vol. 1, pp. 34-39.

[29] See note 53 *infra*.

view."[10] Camus' forthright analysis of all that this implies is hardly refutable:

> "As an example and for the sake of security, it would be wiser, instead of hiding the execution, to hold up the severed head in front of all who are shaving in the morning.
>
> "Nothing of the sort happens. The State disguises executions and keeps silent about these statements and eyewitness accounts [describing the death scene]. Hence it doesn't really believe in the exemplary value of the penalty, except by tradition and because it has never bothered to think about the matter. . . . A law is being applied without being thought out and the condemned die in the name of a theory in which the executioners do not believe. If they believed in it, this would be obvious to all. But the publicity not only arouses sadistic instincts with incalculable repercussions eventually leading to another murder; it also runs the risk of provoking revolt and disgust in the public opinion. It would become harder to execute men one after another, as is done in our country today, if the executions were translated into vivid images in the popular imagination. . . . This is why

[10] The first American State to abolish public executions was Pennsylvania, in 1834, see Filler, *Movements to Abolish the Death Penalty in the United States*, 284 ANNALS 124, 127 (1952), the year in which also Great Britain abolished gibbeting by 4&5 Will. IV, chap. 26, §§ 1, 2. Public execution terminated in England in 1868, see TUTTLE, THE CRUSADE AGAINST CAPITAL PUNISHMENT IN GREAT BRITAIN (1961), 20; and such executions were progressively outlawed in the United States throughout the Nineteenth Century, BYE, CAPITAL PUNISHMENT IN THE UNITED STATES (1919) 6. The last public execution in the country seems to have occurred in Kentucky in 1936. BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY (3d ed. 1949) 307.

we must approve of the position of Gambetta, who, as an adversary of the death penalty, voted against a bill involving suppression of publicity for executions, declaring: If you suppress the horror of the spectacle, if you execute inside prisons, you will smother the public outburst of revolt that has taken place of late and you will strengthen the death penalty.

"Indeed, one must kill publicly or confess that one does not feel authorized to kill. If society justifies the death penalty by the necessity of the example, it must justify itself by making the publicity necessary. It must show the executioner's hands each time and force everyone to look at them—the over-delicate citizens and all those who had any responsibility in bringing the executioner into being. Otherwise, society admits that it kills without knowing what it is saying or doing. Or else it admits that such revolting ceremonies can only excite crime or completely upset opinion." (CAMUS 186-188.)

The relation between this practice of secret executions and the "evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles, supra,* 356 U.S. at 101, should be obvious. We hide our executions because we are ashamed to show them, because they make men sick. To jump ahead for a moment to consideration of the matter in constitutional terms, one wonders whether this Court would sustain today a *public* execution as consistent with the Eighth Amendment? We suggest that it would not; that constitutional law as well as public sentiment would condemn such barbarous shows. Does hiding the matter of execution make it any the more consistent with our constitutional and public standards of decency? Our legally untrained scholar would, we think, conclude with Gottlieb that it does not.

"It is of the greatest significance, I suggest, that executions are carried out away from the public eye and that the public spectacle of hangings and beheadings has been left behind to earlier centuries. This is evidence that if people were to witness the decay of the waiting man, to hear his cries and watch his final struggles, they would be affronted in their consciences, and in their standards of human dignity and decency. Our systematic concealment of executions creates a strong inference that capital punishment now falls under our expanded definition of 'cruelty,' particularly when we contrast this present custom of secrecy with the one-time public display of executions." [31]

(6) Gottlieb speaks of the "decay of the waiting man"; and others too have recognized the torment of the thousand days on death row. The length of time, of course, is not what is alone important here—although it is important.[32] Our hypothetical scholar would only have to imag-

[31] GERALD H. GOTTLIEB ON CAPITAL PUNISHMENT (Center for the Study of Democratic Institutions 1967) 6, reprinted in 72 CASE & COMMENT (No. 4), 3, 8 (July-Aug., 1967).

[32] "The devastating, degrading fear that is imposed on the condemned man for months or years is a punishment more terrible than death, and one that was not imposed on the victim." CAMUS 200. Compare the comments of Charles Gardner, an inmate of San Quentin's death row, reported in the NEW YORK LAW JOURNAL, November 27, 1968, p. 1, col. 4: "Gardner has been on death row ten months, waiting, hoping that he could escape the gas chamber. 'But rather than stay five to eight years on the row, I'd rather be dead by gas,' Gardner said. 'Waiting for it to come is worse than getting it.'"

Of course, the delay in Gardner's and other cases today is an incident of our protective system of criminal justice, and a necessary incident of the appeals and post-conviction proceedings required by due process. But that makes it none the less tormenting. Surely, our Constitution could not tolerate capital punishment today without due process. The question is whether, with due process and its necessary incidents, the punishment is cruel and unusual within the Eighth Amendment.

ine himself in the position of the condemned man for an hour prior to his execution, in order to appreciate the cruelty, the intolerable inhumanity, of the event that is occurring. Dostoyevski, who was actually in that position, thus described it:

> "But the chief and the worst pain may not be in the bodily suffering but in one's knowing for certain that in an hour, and then in ten minutes, and then in half a minute, and then now, at the very moment, the soul will leave the body and that one will cease to be a man and that that's bound to happen; the worst part of it is that it's *certain*. When you lay your head down under the knife and hear the knife slide over your head, that quarter of a second is the most terrible of all." DOSTOYEVSKY, THE IDIOT (Modern Library, 1935) 20 (original emphasis).

Again, Camus has put the matter in characteristically clear perspective:

> "[In considering the argument from *lex talionis*] let us leave aside the fact that the law of retaliation is inapplicable and that it would seem just as excessive to punish the incindiary by setting fire to his house as it would be insufficient to punish the thief by deducting from his bank account a sum equal to his theft. Let us admit that it is just and necessary to compensate for the murder of the victim by the death of the murderer. But beheading is not simply death. It is just as different, in essence, from the privation of life, as a concentration camp is from prison. It is a murder, to be sure, and one that arithmetically pays for the murder committed. But it adds to death a rule, a public premeditation known to the future victim, an organization, in short, which is itself

a source of moral sufferings more terrible than death. Hence there is no equivalence. Many laws consider a premeditated crime more serious than a crime of pure violence. But what then is capital punishment but the most premeditated of murders, to which no criminal's deed, however calculated it may be, can be compared? For there to be an equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life." (CAMUS 199.)

(7) Finally, our scholar would consider the arguments which are put forward today in support of the death penalty. These rest for the most part upon the proposition that death is the most efficacious deterrent which—if used sufficiently infrequently and within the hiding of prison walls—a non-totalitarian society can stomach.[33] Reading between the lines, he would come to the obvious conclusion of Clarence Darrow: "That capital punishment is horrible and cruel is the reason for its existence." *Darrow, A Comment on Capital Punishment,* in LAURENCE, A HISTORY OF CAPITAL PUNISHMENT (1960), xv, xvii. And coming to his own conclusion, on the basis of all that we have said above, our scholar would most firmly disagree that death *is* a punishment which a non-totalitarian society can stomach at all.

Aye, but there's of course the rub. Our hypothetical student of culture is free to reach his own independent con-

[33] See the exhaustive summary in CAPITAL PUNISHMENT: MATERIAL RELATING TO ITS PURPOSE AND VALUE (compiled by Hon. Guy Favreau, Canadian Minister of Justice) (Queen's Printer, Ottawa, 1965) [hereafter cited as FAVREAU] 23-28.

clusions about the death penalty in a manner that would be altogether inappropriate as a principle for decision by this Court construing the Eighth Amendment. For this Court does not sit to make the personal views of its Justices the rule of the Eighth Amendment or the Fourteenth; and, as it has often said, in matters of constitutional adjudication under such broad clauses as Cruel and Unusual Punishment or Due Process, much deference must be given by the Court to legislative judgment. See *Spencer* v. *Texas*, 385 U.S. 554 (1967).

We come, therefore, to what we think lies at the heart of the question whether Edward Boykin's sentence of death is a constitutionally forbidden cruel and unusual punishment. That is a dilemma which is inherent in the Eighth Amendment. It derives from the circumstance that the Amendment plainly is a restriction upon the legislative enactment of cruel penalties, as well as upon the judicial imposition of them. This Court has so held by voiding statutes under the Cruel and Unusual Punishment Clause. *Weems* v. *United States*, 217 U.S. 349 (1910); *Trop* v. *Dulles*, 356 U.S. 86 (1958) (by a plurality); *Robinson* v. *California*, 370 U.S. 660 (1962). And the force of the Clause is not limited to prohibition of punishments that would have turned the stomachs of the Framers in the Eighteenth Century. "The clause of the Constitution . . . may therefore be progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems* v. *United States, supra*, 217 U.S. at 378; see generally *id.*, 369-373. We repeat the important observation with which *Trop* v. *Dulles* outlawed the hoary penalty of banishment: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 101.

But surely there lies the most extraordinary difficulty in a process of constitutional adjudication by which this Court must subject legislation to the test of enlightened public opinion, and must judge the validity of a legislature's product according to society's standards of decency. For, after all, both in constitutional contemplation and in fact, it is the legislature, not the Court, which responds to public opinion and immediately reflects the society's standards of decency. If the question asked by the Eighth Amendment really be whether our democratic society can tolerate the existence of any particular penal law that is on the books, the Eighth Amendment's answer will always be that it can —and for the simple reason that the law is on the books of a democratic society. So either the Eighth Amendment is *not* a judicially enforceable restriction upon legislation; or the *Weems-Trop* test referring to contemporary public standards of decency is not a usable measure of the Amendment; or else the question which we have just posed is not the proper question to which the Amendment and the *Weems-Trop* test respond.

As this way of putting the matter suggests, we think that the question—which at first blush may appear to be the question presented by Boykin's attack on Ala. Code, tit. 14, § 415 (1959)—is the wrong question. We suggest what we think is the right one below. For we cannot believe that the Eighth Amendment is not a restriction upon inhuman penal legislation rightfully enforceable by this Court. Nor do we believe that the Amendment's prohibition is restricted to drawing and quartering, and similar antiquated butcheries—nor, on the other hand, that it invokes the unassisted penological impressions of particular Justices. The *Weems-Trop* test *is*, we submit, the proper one. Common standards of decency in our contemporary society *do* set the limits of punishment allowable under the Eighth Amendment. The problem is how those standards are to

be ascertained, and with regard to what specific question.

We begin with the specific question. When a man such as Edward Boykin comes before the Court claiming that the law under which he was sentenced provides for an unconstitutional cruel and unusual punishment, the question is not: will contemporary standards of decency allow the existence of such a law on the books? The question is, rather: will contemporary standards of decency allow the execution of the law's penalty *in fact*? By this we do not mean that the Court is to review the penalty decision of the sentencing judge or jury in particular cases. Our concentration upon the question whether public conscience will support the law's application *in fact* does not mean to draw the distinction between general and specific applications of a penalty. It means to draw the distinction between what public conscience will allow the law to *say* and what it will allow the law to *do*—between what public decency will permit a penal statute to threaten and what it will allow the law to carry out—between what common revulsion will forbid a government to put on its statute books as the extreme, dire terror of the State (not to be ordinarily, regularly or in other than a few freak cases enforced), and what public revulsion would forbid a government to do to its citizens if the penalty of the law were generally, even-handedly, non-arbitrarily enforced in all of the cases to which it applied.

This last point—regarding general, even-handed, non-arbitrary application—is critical. For in it lies, we think, a large part of the need to have a Cruel and Unusual Punishment Clause in the Constitution, and of the need to have courts enforce it. The government envisaged for this country by the Constitution is a democratic one, and in a democracy there is little reason to fear that penal laws will be placed upon the books which, in their general applica-

tion, would affront the public conscience. The real danger concerning cruel and inhuman laws is that they will be enacted in a form such that they can be applied sparsely and spottily to unhappy minorities, whose numbers are so few, whose plight so invisible, and whose persons so unpopular, that society can readily bear to see them suffer torments which would not for a moment be accepted as penalties of general application to the populace.

Herein is found the difference between the judgment which the legislator makes, responding *politically* to public conscience, and the judgment which a court must make under the obligation which the Eighth Amendment imposes upon it to respond *rationally* to public conscience. A legislator may not scruple to put a law on the books whose general, even-handed, non-arbitrary application the public would abhor—precisely because both he and the public know that it will not be enforced generally, even-handedly, non-arbitrarily. But a court cannot sustain such a law under the Eighth Amendment. It cannot do so because both the Amendment itself and our most fundamental principles of due process and equal protection forbid American governments the devices of arbitrariness and irregularity —even as a sop to public conscience.

To put the matter another way, there is nothing in the political process by which public opinion manifests itself in legislated laws that protects the isolated individual from being cruelly treated by the state; and public conscience often will support laws enabling him to be so mistreated, provided that arbitrary selection can be made in such a fashion as to keep his numbers small and the horror of his condition mute. Legislators neither must nor do take account of such individuals. But it is the precise business of courts to take account of them, and to disallow under the Eighth Amendment the application to them of penalties so harsh that public conscience would be appalled by their less arbitrary application.

We shall develop this theme more fully, in the pages that follow, with regard to the death penalty. But we have said enough, at this point, to enable us to state our major submission on behalf of Edward Boykin. His sentence of death for simple robbery is, we think, a cruel and unusual punishment because it affronts contemporary standards of decency, universally felt, that would condemn the use of death as a penalty for the crime of robbery if such a penalty were uniformly, regularly, and even-handedly applied either to all robbers or to any non-arbitrarily selected sub-class of robbers.

One may take any rational standard one wishes for selection among the perpetrators of the crime of simple robbery, apply it fairly, and imagine the execution of all the robbers who fall within the class. Since there were 202,053 robberies known to the police in the United States last year,[24] we assume that our rational selection standard would net us at least a hundred robbers for the year—say, exactly one hundred. Imagine, now, their electrocutions and gassings in a single year. The number we have hit upon proves to be, as we shall see, four times the number of robbers actually executed in the United States during the thirty-eight years between 1930 and 1967. It is twelve and a half times the number of robbers actually executed in the eighteen years between 1950 and 1967. If these one hundred robbers were actually executed in the year 1968, we submit it is palpable that the public conscience of this Nation would be profoundly and fundamentally revolted, and that the death penalty for robbery would be abolished overnight for the atavistic horror that it is. Our reasons for this submission follow. First we pause for one additional paragraph to make our legal point clear.

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[24] UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS (CRIME IN THE UNITED STATES), 1967 (released August 27, 1968), p. 60.

We disagree not with the reasoning process, but rather with the factual premise, of a statement made by this Court ten years ago in *Trop* v. *Dulles*, *supra*, 356 U.S., at 99:

> "Whatever the arguments may be against capital punishment—and they are forceful—the death penalty has been employed throughout our history, and, *in a day when it is still widely accepted*, it cannot be said to violate the constitutional concept of cruelty." (Emphasis added.)

We think that today it is simply not correct that the death penalty is "still widely accepted." [35] We speak, for the reasons which we have just stated in detail, not of its acceptance on the pages of the statute books, but of its acceptance in actual usage—and of such acceptance as it does not illegitimately obtain by being irregularly and arbitrarily applied. Far from being "widely accepted," the death penalty today is with rare public unanimity rejected and repudiated—particularly for such crimes as robbery. We proceed next to demonstrate this point and to develop its constitutional implications.

(1) All informed observers of the death penalty agree in describing a world-wide trend toward its disuse that is nothing short of drastic. See UNITED NATIONS 81-82, 96-97; SELLIN (1959) 4-14; MATTICK, THE UNEXAMINED DEATH (1966) [hereafter cited as MATTICK] 5-6; Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8 (1952); Sellin, *The Inevitable End of Capital Punishment*, in SELLIN, CAPITAL PUNISHMENT (1967) 239-240; Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 9-11 (1964). There are probably fewer legal executions per year

[35] Apart from this observation in *Trop*, no decision of the Court stands in the way of holding Boykin's death sentence invalid under the Eighth Amendment. *Wilkerson* v. *Utah*, 99 U.S. 130 (1878),

in the entire world today than the number estimated to have occurred each year in London and Middlesex County alone during the reign of Edward VI. See Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIM. & POL. SCI. 397, 408 (1965) [hereafter cited as *Patrick*]. Although Patrick reports more than one hundred capital crimes on the statute books of 107 different nations, *id.*, at 406-407, "nearly all of the crimes which result in actual execution are murder in some form, whether assassination, premeditated murder or felony murder. In fact, of the 1,033 reported executions [for the period 1961-1965], some 929 appear to have been for murder." UNITED NATIONS 97.

In the United States, the decreasing trend of executions has been especially dramatic. The National Crime Commission recently noted that:

> "The most salient characteristic of capital punishment is that it is infrequently applied. . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize

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and *In re Kemmler*, 136 U.S. 436 (1890), do state, respectively, that shooting and electrocution as forms of execution are not cruel and unusual. The statements in both cases are dicta: no Eighth Amendment point was presented in *Wilkerson*, and the Eighth Amendment issue was put out of the case in *Kemmler* by the now obsolete holding that the Eighth Amendment did not apply to the States. In both cases, the Court's attention was focused upon the manner, not the propriety, of inflicting death; the latter question appears not to have been considered by the parties or the Justices. And, finally, the cases are three quarters of a century old, while the Eighth Amendment is, as the Court said in *Weems* v. *United States*, 217 U.S. 349, 378 (1910), "progressive."

McElvaine v. *Brush*, 142 U.S. 155 (1891), and *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (1947), also were concerned with particular incidents of the death penalty, not its essential permissibility under the Eighth Amendment. The former case involved a challenge to solitary confinement prior to execution; the latter, a challenge to re-execution after the first attempt to kill Francis failed.

the carrying out of a death sentence." (PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967) 143.)

The extent to which this is true appears upon inspection of the highly reliable figures on executions maintained by the Federal Bureau of Prisons since 1930. Its latest cumulative report shows that 3,859 persons were executed under civil authority in the United States between 1930 and 1967. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, No. 42, *Executions 1930-1967* (June 1968) [hereafter cited as NPS (1968)], p. 7. Of these 3,859, only 191 were executed between 1960 and 1967; only 25 during the years 1964-1967. *Ibid.* The trend is shown quite adequately by setting out the figures for the number of executions during each of the following representative years:

Total Number of Executions in the United States

1930	—	155
1935	—	199
1940	—	124
1945	—	117
1950	—	82
1955	—	76
1960	—	56
1961	—	42
1962	—	47
1963	—	21
1964	—	15
1965	—	7
1966	—	1
1967	—	2

During the calendar year 1968, there will be no executions in the United States.

It is interesting to note the geographic distribution of the executions. (We shall return later to the racial figures.) Of the 3,859 persons killed since 1930, 33 were executed by the federal government; 608 by nine northeastern States; 403 by twelve north-central States; 506 by thirteen western States; and 2,306 by sixteen southern States and the District of Columbia. Since 1960, the corresponding figures for 191 executions are as follows: federal—1; northeastern States—17; north-central States—21; western States—48; southern States and D.C.—104. NPS (1968), pp. 8-9. As of December 31, 1967, there were 435 men on death row throughout the entire country. Two of these were federal prisoners; 62 were in the northeastern States; 55 were in the north-central States; 91 were in the western States; and 225 were in the southern States and D.C. *Id.*, pp. 22-23.

Of the 3,859 persons executed between 1930 and 1967, 3,334 died for the crime of murder, 455 for the crime of rape, and only 70 for other crimes. *Id.*, p. 7. Twenty-five of these seventy died for robbery-like crimes, usually aggravated forms of robbery. *Id.*, pp. 10-11 [35]. Two of the 25 were executed by the federal government; the remaining 23, by six southern States. *Ibid.* Alabama has executed five men for robbery since 1930. *Ibid.*

There have been only two executions for robbery-like crimes in the United States since 1960: one in that year,

[35] The figure given at *id.*, p. 7, n. (a), "23," is incorrect. Concerning the robbery-like crimes for which death may be inflicted in the United States today, see note 54 *infra*.

and one in 1962.[37] Of 85 men *sentenced* to death in 1967, only one received that sentence for a robbery-like crime. NPS (1968), p. 13. Of the 435 men on death row as of December 31, 1967, only four were there for robbery-like crimes. *Ibid.* These four came from two southern States: Alabama and Texas. *Id.*, pp. 22-23.

(2) We summarize our conclusions from the available data as follows: Actual use of the death penalty throughout the world is on the decline; and, in the United States, precipitously on the decline. In this country, sentences of death and executions are predominately a southern phenomenon. Sentences of death and executions for other crimes than murder are virtually exclusively a southern phenomenon.[38] Since 1960, at the least, executions in the United States for any crime have been rare. During the last few years they have been freakishly rare. Executions for robbery-like crimes in the United States have been freakishly rare since 1930. In the nine years from and including 1960 until today, there were two of them. At the last reported count, four men in the Nation were on death row for crimes in the nature of robbery: Edward Boykin and three others. Boykin alone was on the row for simple robbery.[39]

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[37] These two executions are reflected in BEDAU 96, 108. That there have been no others since 1960 is established by examination of the yearly National Prisoner Statistics Bulletins on Executions since that year.

[38] Of 525 persons executed between 1930 and 1967 for crime other than murder, 482 were executed in sixteen southern States and the District of Columbia. NPS (1968), pp. 10-11. Of 78 persons on death row as of December 31, 1967 for crimes other than murder, 69 were in the same sixteen southern States. *Id.*, pp. 22-23.

[39] The three others were on death row in Texas, which has not punished simple robbery capitally in this Century.

(3) But what do these almost incredible rarities in the use of capital punishment imply for the constitutional question before the Court? In the first place, they obviously imply—in the language of *Trop* v. *Dulles*, *supra*—that capital punishment is *not* "still widely accepted" in contemporary America. Recently, this Court cited public opinion polls indicating that less than half of the American people believe in the death penalty. *Witherspoon* v. *Illinois*, 391 U.S. 510, 519-520 (1968). The value of such polls is very slight as a gauge of the standards of decency to which the Eighth Amendment bids this Court look. This is so because opinions tapped in this fashion are notoriously fickle;[40] and also because the citizen who deals with a poll-taker—like the legislator who puts or maintains a capital statute on the books[41]—can have his cake and eat it too. He can afford to approve the principle of killing because in practice the persons selected to die will be so few as to go unnoticed. The real measure of American moral attitudes about the death penalty is reflected in what this Nation of 200 million people *does*. What it has done, in the years 1966-1968 is to execute three people—none for robbery.

Of course, stays of execution and state and federal post-conviction proceedings on behalf of condemned men affect these figures, but not very much. At the end of 1967, there were only 435 men on death row, notwithstanding the near cessation of executions since 1964. At the same date, there were only four men on death row for robbery-like crimes, notwithstanding America has executed no one for such a

[40] "If the last victim happens to arouse pity—a feeble-minded boy for instance, unhinged by the movies, or a mother of two children, half-crazed by gin and jealousy—up go the 'nays' of mercy like a flight of doves; if he is a cool customer like Christie, up go the 'ayes' like a swarm of vultures." KOESTLER 163.

[41] See pp. 38-40 *supra*.

crime since 1962. Plainly, the processes of American justice through which the conscience of a people may be glimpsed are sending very, very few men onto death row, and taking most of them off again before execution day. What American acceptance of the death penalty now boils down to is that America can stomach a few legal killings a year.

(4) One may look at these figures from another direction as well. No one knows or can estimate accurately how many convictions of capital crimes are returned in the United States yearly. But we do know that thirty-nine States, the District of Columbia, and the federal jurisdiction all retain on their books statutes of general applicability punishing one or more offenses with death. In some States, half a dozen or more crimes may be so punishable. (Appendix A to this brief sets out the penal provisions of the several States carrying the death penalty.) Yet, with all this capital armament in the arsenal of a Nation of enormous and burgeoning population, with a growing crime rate and a going crime scare, only a few, rare men are sentenced to death and fewer executed. This phenomenon reflects, we suggest, an overwhelming national repulsion against the penalty of death. Such a repulsion is all the more striking when one takes into account: (a) that for the past several years the country has undergone one of the most intense of its recurring periods of public agitation about and fear of crime; (b) that for a number of years there have been so few executions as to provide almost no focus for the mobilization of public sentiments *against* the death penalty;[43] (c) that during these years, and many more before them, American executions have been conducted in secret, their most horrible aspects carefully concealed from public view; (d) that the death penalty is sponsored by the State (in

[43] See Bedau 23.

most jurisdictions), publicly approved by State officials,[42] and supported by claims prevalent in law-enforcement quarters[43] (although quite without basis in fact[44]) that the penalty has unique penological values, particularly as a deterrent. It strongly appears, we think, that even under the most favorable conditions for capital punishment—with the vices of the death penalty concealed and its virtues inaccurately extolled—the American conscience has repudiated it hands down.

(5) Of course, the penalty remains on the statute books. But is it not obvious, as Warden Lawes observed long ago, that it does so only *because* of the rarity with which it is applied in fact?

> "'What would be the attitude of the American people if by good or ill circumstance the ten thousand men and women who in any one year commit our murders and manslaughters in these United States, would all be convicted of murder, sentenced to death, and that punishment actually inflicted?' What, indeed, but an almost universal cry for abolition?" (LAWES, TWENTY THOUSAND YEARS IN SING SING (1932) 306-307.)

It is, certainly, a matter of history that public acceptability of the death penalty has been maintained only by giving up its mandatory form and enacting statutes allowing jury or

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[42] "The primary support today for the death penalty comes from law enforcement groups, that is, from the police and from prosecutors." BEDAU 120. See also note 53, para. (3), *infra*.

[43] J. Edgar Hoover's several releases on the subject of the death penalty are widely publicized examples of these claims. They are reprinted from the F.B.I. Law Enforcement Bulletin and the Uniform Crime Reports in BEDAU 130.

[44] See note 58 *infra*.

court discretion in capital sentencing.[46] The discretion given by these statutes is wholly arbitrary, as we shall see in Part III, *infra*, of this brief. And the evidence is overwhelming that the discretion has been used arbitrarily.[47] Whatever acceptability the death penalty may have today, then, appears to be purchased by both legal and practical concessions to arbitrariness.

(6) We have already sketched, at pp. 38-40 *supra*, the general reasons why we believe that a legislated penalty cannot survive Eighth Amendment scrutiny if its acceptability to public conscience rests on such concessions. We shall develop the point further below, with specific reference to the death penalty, after we state here the reasons for our assertion that the penalty is in fact arbitrarily applied.

The very rarity of death sentences and executions, certainly, gives rise to a strong inference of arbitrariness, since it is virtually impossible to conceive non-arbitrary standards by which the very few men chosen to die in America should have been singled out from the enormous class of their death-eligible peers. That inference is heightened by the fact that the selective judgments made at the three most critical stages of a capital proceeding—the prosecutor's decision whether to seek the death penalty, the jury's decision whether to impose it, and the governor's

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[46] There are very few crimes in the United States today which carry a mandatory death penalty, and those few are for the most part of the obscure sort under which no one is ever charged (treason, in several States; perjury in a capital case, etc.) See BEDAU 48-52. And see Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8 (1952); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953). Outside the United States, also, mandatory capital punishment is rapidly being replaced by grants of discretion. UNITED NATIONS 13, 82, 87.

[47] See the succeeding paragraph.

decision whether to commute it—are all made without the slightest pretense of standards or guidelines. Indeed, the entire course of a capital proceeding is attended by procedures, common to virtually all American jurisdictions, that tend to make its rational disposition incomparably difficult. See note 6 *supra*.

The result is what one might suspect.

> "Of all the uncertain manifestations of justice, capital punishment is the most inequitable. It is primarily carried out against the destitute, forlorn and forgotten. . . . Members of racial and cultural minority groups suffer most. The hundreds of extraneous factors, including geography, that decide whether a convicted man will actually live or die, makes capital punishment a ghastly, brainless lottery." (*West*, p. 2.)

One may identify several dimensions of arbitrariness here. *First*, there is the simple matter of fluke—of baseless, random choice in the matter of life or death.

> "A small and capricious selection of offenders have been put to death. Most persons convicted of the same crimes have been imprisoned. Experienced wardens know many prisoners serving life or less whose crimes were equally, or more atrocious, than those of men on death row." (Statement by Attorney General Ramsey Clark, Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, on S. 1760, *To Abolish the Death Penalty*, July 2, 1968, Department of Justice Release, p. 2.)

Accord: Lawes, Twenty Thousand Years in Sing Sing (1932) 302, 307-310; Duffy & Hutchins, 86 Men and 2

WOLFGANG (1962) 254-255; Testimony of Clinton T. Duffy, in *Hearings*, vol. 1, pp. 44-44A." And see BEDAU 410-413.

Second, "the death penalty . . . almost always hits the little man, who is not only poor in material possessions but in background, education, and mental capacity as well. Father Daniel McAlister, former Catholic chaplain at San Quentin, points out that 'the death penalty seems to be meant for the poor, uneducated, and legally impotent offender." DUFFY & HIRSHBERG, *op. cit. supra*, 256-257. See the testimony of former Governor Michael Di Salle, in *Hearings*, vol. 1, pp. 14-16; see also note 8, *supra*.

Third, there is persuasive evidence of racial discrimination in the selection of the men who will die. This is generally difficult or impossible to prove in judicially cognizable ways. But it is strongly suggested by the *National Prisoner Statistics*;[48] it has been borne out in a number of discrete

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[48] "I have often said, and I repeat here, that I can take you into San Quentin Prison or to Sing Sing, Leavenworth or Atlanta Prisons and I can pick out many prisoners in each institution serving life sentences or less, and can prove that their crimes were just as atrocious, and sometimes more so, than most of those men on the row."

[49] The following are the total number of persons executed between 1930 and 1967 (3,859), broken down by offense and race, as they appear in NPS (1968), p. 7:

	Murder	Rape	Other	Total
White	1664 (49.9%)	48 (10.6%)	39 (55.7%)	1751 (45.4%)
Negro	1630 (48.9%)	405 (89.0%)	31 (44.3%)	2066 (53.1%)
Other	40 (1.2%)	2 (0.4%)	0 (0.0%)	42 (1.1%)
Total	3334 (100%)	455 (100%)	70 (100%)	3859 (100%)

Between 1930 and 1967, there were 35 executions in the United States for robbery-like crimes. The federal government executed two white men; Kentucky executed three; and Oklahoma, one. Nineteen Negroes were executed for these crimes: six in Georgia;

and limited, but carefully done studies,[50] and it has seemed apparent to responsible commissions and individuals studying the administration of the death penalty in this country.[51]

In 1965, *amicus* Legal Defense Fund determined to make a more refined and systematic study of the question of racial discrimination in capital sentencing than had theretofore been attempted. It requested Dr. Marvin E. Wolfgang, Chairman of the Department of Sociology at the University of Pennsylvania, one of the country's most eminent criminologists, to conduct an investigation of the influence of race upon sentencing for the crime of rape in those States where rape is punishable by death. Dr. Wolf-

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five in Alabama; three in Mississippi; three in Texas, and two in Kentucky. *Id.*, pp. 10-11.

The following is the breakdown of the 435 men reported under sentence of death in the country as of December 31, 1967 (*id.*, pp. 22-23):

	White	Negro	Other	Total
Nine northeastern States	29	33	0	62
Twelve north-central States	31	24	0	55
Thirteen western States	68	21	2	91
Sixteen southern States	66	159	0	225
Federal	1	1	0	2
Total	195	238	2	435

[50] Johnson, *The Negro and Crime*, 271 ANNALS 93 (1941); Garfinkel, *Research Notes on Inter- and Intra-Racial Homicides*, 26 SOCIAL FORCES 369 (1949); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 18-21, 52-53 (1964).

[51] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967), 143; PENNSYLVANIA, JOINT LEGISLATIVE COMMITTEE ON CAPITAL PUNISHMENT, REPORT (1961) 14-15; UNITED NATIONS 32, 36; BEDAU 411-413; MERRIAM 5, 17; HARTUNG, *Trends in the Use of Capital Punishment*, 284 ANNALS 8, 14-17 (1952); Bedau, *A Social Philosopher Looks at the Death Penalty*, 123 AM. J. PSYCHIATRY 1361, 1362 (1967).

gang's research covered eleven States during a period of twenty years, 1945-1965. His findings with respect to the State of Arkansas are presently before this Court in the Petition for Certiorari, in *Maxwell* v. *Bishop*, O.T. 1968, No. 622. To summarize them, Dr. Wolfgang found a twenty-year pattern of racially differential sentencing pursuant to which Negro defendants convicted of rape—and particularly Negro defendants convicted of the rape of white complainants—were disproportionately frequently sentenced to die. Exhaustive efforts to explain the sentencing differentials on other grounds than race failed; Dr. Wolfgang concluded that, in Arkansas, Negroes had been discriminatorily sentenced to death for rape on account of race.

Dr. Wolfgang's findings for the other States he studied are neither of record here nor in judicially noticeable form, so we pretermit discussion of them. Based upon his testimony relating to Arkansas, the Court of Appeals for the Eighth Circuit admitted that there were "recognizable indicators" that "the death penalty for rape may have been discriminatorily applied over the decades, in that large area of states whose statutes provide for it," *Maxwell* v. *Bishop*, 398 F.2d 138, 148 (1968). The study provides grounds for "suspicion . . . with respect to southern interracial rape trials as a group over a long period of time." *Id.*, at 147. These conclusions are sufficient for our present purposes.

(7) Of course, what is true for Arkansas or for the South as a whole may not be true for Alabama, and what is true for rape may not be true for robbery. The execution figures do show a remarkable similarity in the racial breakdown of men put to death in sixteen southern States as a group and in Arkansas and Alabama, and for rape and for robbery.

Executions in the South, 1930-1967[a]

	Rape		Robbery		Murder		Other		Total	
	White	Negro	White	Negro	White	Negro	White	Negro	White	Negro
Sixteen Southern States	48	398	4	19	585	1,231	5	11	637	1,659
Alabama	2	20	0	5	26	80	0	2	28	107
Arkansas	2	17	0	0	25	73	0	0	27	90

Also, the procedure by which the life-death sentencing choice is principally made, unfettered jury discretion, is the same throughout the South and in Arkansas and Alabama, for both rape and robbery. From these circumstances, one might infer that if the opportunity it gives for racial discrimination is being seized upon in rape cases throughout the South, it is also seized upon in robbery cases in Alabama. But we are quick to admit that this is inference; and that in Boykin's case, unlike the case of a Southern Negro sentenced to die for rape, strict scientific proof of racial discrimination is hard to come by.

The reason for this is not that there is no discrimination, but that—as the figures in the chart above reveal—the total number of persons sentenced to death for robbery in any State (or even in all the States) is likely too small for reliable statistical analysis. Obviously, a State can discriminate racially and not get caught at it if it kills men only sporadically, not too often. By being arbitrary in selecting the victims of discrimination, a State can get away with both arbitrariness and discrimination. Or, to put the matter another way, if a State invokes a particular penalty sufficiently rarely so that no regular pattern of its use develops, the State *must* be acting arbitrarily; it *may* be acting discriminatorily; it *likely will* be

[a] NPS (1968), pp. 10-11.

acting in a fashion such that the penalty falls most harshly on the poor and disadvantaged; but it *surely will* be acting in a way that escapes the safeguards of the Constitution, unless the Eighth Amendment forbids. Equal Protection and Due Process provide no judicially usable devices to protect the individual from the arbitrariness of the freakishly rare, harsh penalty. This is all the more reason, we believe, for application of the constitutional guarantee against cruel and unusual punishments.

(8) But there are other consequences, as well, of the freakishly rare use of a harsh criminal penalty. We have pointed out above that such use escapes not only meaningful control under the constitutional guarantees of Equal Protection and Due Process; it escapes also the fair scrutiny of public conscience, with its attendant pressure to keep the legislature acting decently. A public can easily bear the rare, random occurrence of a punishment which, if applied regularly, would make the common gorge rise. It seems to us that this is just the kind of penalty at which a prohibition of cruel and unusual punishments must aim.

The unusual character of the death penalty for robbery permits public and political acceptance of its cruelty, but, for that very reason, requires judicial condemnation under the Eighth Amendment. Rare and arbitrary usage which evades the public conscience politically demands the supervision by the public conscience, speaking through the courts, which the Eighth Amendment promises. This is the more true because, we think, rare and arbitrary usage itself affronts "the dignity of man," *Trop* v. *Dulles*, *supra*, and those cherished principles of fair and regular, non-arbitrary treatment of the citizen which the Eighth Amendment, no less than the Fourteenth, supposes.

The coupling of "cruel" with "unusual" punishments is no logical accident within the Amendment. When harsh penalties are used unusually, they inevitably become arbitrary; and arbitrary use of harsh punishments is cruel. What would this Court say, under the Eighth Amendment, of an Alabama statute that condemned convicted robbers to play Russian roulette with a thousand-chambered revolver, or to draw long straws for electrocution, one in every thousand to die? In actuality, of course, this is precisely what Alabama *has* done, and Edward Boykin has drawn the long straw.

(9) It is also important, we think, that the rare, unusual, arbitrary use of a harsh penalty operates to deprive it of any functional place in the rational scheme of a state's penal law. Punishment used in this manner ceases to be an instrument of public justice or of reasoned penal policy, and hence it ceases to have any claim to legitimacy that might be set off against the commands of the Eighth Amendment. As it is, capital punishment generally can be shown to have no particular efficacy, in achieving the legitimate aims of criminal law, that less harsh penalties do not have.[13] If it has any such efficacy with regard to

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[13] The legitimate aims of the criminal law are (1) moral reinforcement or reprobation, (2) isolation, reformation, rehabilitation of the offender, and (3) deterrence. "Modern penological thought discounts retribution in the sense of vengeance." ROYAL COMMISSION 17. *Accord: Williams* v. *New York*, 337 U.S. 241, 248 (1949); *Morrissette* v. *United States*, 342 U.S. 246, 251 (1952); *People* v. *Love*, 53 Cal.2d 843, 856-857 n.3, 350 P.2d 705, 713 n.3 (1960); *People* v. *Oliver*, 1 N.Y.2d 152, ——, 151 N.Y.S.2d 367, 373, 134 N.E.2d 197, 201-202 (1956). So also must the Eighth Amendment discount retribution in the sense of vengeance; for the propriety of vengeance, if recognized, would authorize all cruel and unusual punishments.

(1) Moral reinforcement or reprobation doubtless requires that the most serious crimes be punished most seriously. But, obviously,

the crime of simple robbery, Alabama alone among the

"Grading punishments according to the severity of the crime does not require that the upper limit of severity be the death penalty." BEDAU 268. The reprobation function, therefore, hardly needs or warrants capital punishment. See Ancel, *The Problem of the Death Penalty*, in SELLIN, CAPITAL PUNISHMENT (1967) 3, 16-17, 19.

(2) "[R]eformation . . . can have no application where the death penalty is exacted." ROYAL COMMISSION 18. As for isolation, the evidence is clear and overwhelming that, for no class of criminals, is death required to render them socially safe. Lesser alternatives are ample. SELLIN (1959) 69-79; KOESTLER 144-152; BEDAU 395-405; Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 47 (1964).

This, notably, is the dimension in which Twentieth Century society differs radically from the society of two hundred or even a hundred years ago. In earlier times, imprisonment was not a safe, humane or economically feasible alternative to capital punishment. See 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 (1948) 31-33; Bedau, *The Courts, The Constitution, and Capital Punishment*, 1968 UTAH L. REV. 201, 232 (1968). Today it is. The conclusion has been drawn by the Attorney General in these words: "There was a time when self-preservation necessitated [the] . . . imposition [of the death penalty]. Later inordinate sacrifices by the innocent would have been required to isolate dangerous persons from the public. Our civilization has no such excuse." Statement by Attorney General Ramsey Clark, Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, on S. 1760, *To Abolish the Death Penalty*, July 2, 1968, Department of Justice Release, p. 2.

(3) As for deterrence, there is simply no evidence—despite the most exhaustive inquiry into the subject—that the death penalty is a superior deterrent to lesser punishments. See SELLIN (1959) 19-63; SELLIN, CAPITAL PUNISHMENT (1967) 135-186, 244-253; MATTICK 8-28; KOESTLER 48-61, 171-178; CALVERT, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY (3d ed. 1928) 51-90; BEDAU 214, 258-343; Bedau, *A Social Philosopher Looks at the Death Penalty*, 123 AM. J. PSYCHIATRY 1361, 1362 (1967); Hook, *The Death Sentence*, in BEDAU 146, 147-148, 151. A few law enforcement officials and others who support the death penalty sometimes appear to argue that this proposition is factually debatable. It is not, as more candid proponents of capital punishment admit. "It is generally agreed between the retentionists and abolitionists, whatever their opinions about the value of comparative studies of deterrence, that the data which now exist show no correlation be-

States has perceived this virtue."[4] But we may put aside

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tween the existence of capital punishment and lower rates of capital crime." UNITED NATIONS 123. Every serious inquiry into the death penalty has accepted this conclusion. UNITED NATIONS 55-58, 115-119; ROYAL COMMISSION 18-24, 58-59, 328-380; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967) 143; NEW YORK STATE, TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, SPECIAL REPORT ON CAPITAL PUNISHMENT (1965) 2; PENNSYLVANIA JOINT LEGISLATIVE COMMITTEE ON CAPITAL PUNISHMENT, REPORT (1961) 9, 20-29; FAVREAU 36-37; and see the debates collected in SELLIN, CAPITAL PUNISHMENT (1967) 55-104, and in FAVREAU, *passim*.

Significantly, wherever serious official inquiries have found some support for the thesis that capital punishment may have greater deterrent efficacy than imprisonment, that support has been found in the impressionistic opinions of police, prosecutors and other law enforcement officials, unsustained by objective evidence. See CANADA, JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON CAPITAL PUNISHMENT, REPORT (1956) paras. 29-33, 43-52; NEW JERSEY, COMMISSION TO STUDY CAPITAL PUNISHMENT, REPORT (1964) 8-10; FAVREAU 4, 23. The Royal Commission also gave some weight to such impressionistic opinions, while explicitly recognizing that there was no objective evidence behind them. ROYAL COMMISSION 18-24. Interestingly, corrections personnel appear very preponderately to believe that capital punishment has no particular deterrent efficacy. DUFFY & HIRSCHBERG, 88 MEN AND 2 WOMEN (1962) 257; Testimony of Clinton T. Duffy, in *Hearings*, vol. 1, pp. 42-45; Thomas, *Attitudes of Wardens Toward the Death Penalty*, in BEDAU 242.

[4] There are nine States which presently provide the death penalty as the maximum punishment for some form of robbery. Only Alabama provides death as the maximum punishment for simple robbery. Ala. Code, tit. 14, §415 (1959). The other eight States utilize capital punishment for forms of aggravated robbery. Ga. Code Ann. §26-2502 (Supp. 1967) (by force or with offensive weapon); Ky. Rev. Stat. Ann. §433.140 (Supp. 1966) (armed); Miss. Code Ann. §2367 (1957) (with deadly weapon); Mo. Ann. Stat. §§560.120, 560.135 (1953) (with deadly weapon); Okla. Stat. Ann. tit. 21, §801 (1958) (with dangerous weapon); Tenn. Code Ann. 39-3901 (Supp. 1968) (with deadly weapon); Tex. Pen. Code art. 1408 (1948) (with deadly weapon); Va. Code Ann. §18.1-91 (1960) (by force or with deadly weapon); see also §18.1-90 (armed bank robbery). As a result of a revision of its penal code this year, Georgia will cease to punish aggravated

the broader question whether—if regularly, fairly, even-handedly and non-arbitrarily applied—capital punishment

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robbery with the death penalty as of July 1, 1969. Ga. Code Ann. §26-1901 (1968).

(Perhaps it should be noted, for the sake of completeness, that Kentucky makes capital the offense of assault with intent to rob while armed with a deadly weapon, Ky. Rev. Stat. §433.150 (Supp. 1966); while in several other states, train robbery is capital, see BEDAU 44.)

There are sixteen states which punish simple robbery with a maximum term of ten years or less. Conn. Gen. Stat. Ann. §53-67 (1960); Iowa Code Ann. §711.3 (1950); Kan. Gen. Stat. Ann. §§21-528, -529 (1964); Ky. Rev. Stat. §433.120 (1962); La. Rev. Stat., tit. 14, §65 (1951); Md. Ann. Code, art. 27, §486 (1957); Minn. Stat. Ann. §609.24 (1964); N.M. Gen. Stat. §§40A-16-2, 40A-29-3; N.Y. Pen. Law §§160.05, 70.00 (1967); N.C. Gen. Stat. §14-2 (1953) (see *State* v. *Stewart*, 255 N.C. 571, 122 S.E.2d 355 (1961)); Okla. Stat. Ann., tit. 21, §§797, 799 (1958); Pa. Stat. Ann., tit. 18, §4704 (1963); S.C. Code Ann. §§16-11, 17-552 (1962) (see *Dukes* v. *State*, 248 S.C. 227, 149 S.E.2d 598 (1966); Vt. Stat. Ann., tit. 13, §603 (1958); Va. Code Ann. §18.1-91 (1960); Wis. Stat. Ann. §943.32 (1958).

There are fourteen states and three federal territories which provide a maximum term of between ten and twenty years for simple robbery. Alaska Stat. §11.15.240 (1962); C.Z. Code, tit. 6, §2361 (1963); Colo. Rev. Stat. Ann. §40-5-1 (Supp. 1967); D.C. Code Ann. §22-2901 (1967); Ga. Code Ann. §26-2502 (Supp. 1967) (also Ga. Code Ann. §26-1901 (1968)); Hawaii Rev. Laws §§306-8-11 (1955); Ill. Ann. Stat., ch. 38, §18-1 (Smith-Hurd 1964); Mich. Comp. Laws Ann. §750.529 (1968); Miss. Code Ann. §2364 (1957); Nev. Rev. Stat. §200.380 (1967); N.J. Rev. Stat. §2A:141-1 (1937); Ore. Rev. Stat. §163.290 (1967); P.R. Laws Ann., tit. 33, §§851, 853 (1956); S.D. Code §§13.2601-03 (1939); Tenn. Code Ann. §39-3901 (Supp. 1968); W. Va. Code Ann. §61-2-12 (1966); Wyo. Stat. Ann. §6-65 (1959).

There are six states which punish simple robbery with a maximum term of more than twenty years. Ark. Stat. Ann. §41-3602 (1964); Del. Code Ann., tit. 11, §811 (1953); Ind. Ann. Stat. §10-4101 (1956); Neb. Rev. Stat. §28-414 (1943); N.H. Rev. Stat. Ann. §585:18 (1955); Ohio Rev. Code Ann. §2901.12 (1954).

There are also thirteen states which provide a maximum penalty of life imprisonment for simple robbery. Ariz. Rev. Stat. Ann. §13-643 (Supp. 1967); Cal. Pen. Code §§211a, 213 (West 1955); Fla. Stat. §813.011 (1965); Idaho Code Ann. §18-6503 (1949); Me. Rev. Stat. Ann., tit. 17, §3401 (1964) (any term of years);

for robbery would serve some valid function that the State of Alabama is constitutionally free to pursue. Used as

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Mass. Gen. Laws Ann., ch. 265, §19 (1959); Mo. Ann. Stat. §560.135 (1953); Mont. Rev. Code Ann. §94-4303 (1949); N.D. Cent. Code §§12-31-07 to -09 (1960); R.I. Gen. Laws Ann. §11-39-1 (1956); Texas Pen. Code, art. 1408 (1948); Utah Code Ann. §§76-51-1-2 (1953); Wash. Rev. Code Ann. §9.75.010 (1961).

There are twenty-seven States which punish aggravated robbery with higher maximum penalties than they do simple robbery. As noted above, eight States provide the death penalty as the maximum punishment for aggravated robbery. Of the remaining twenty-one States, eight punish aggravated robbery with a maximum punishment of life imprisonment. Colo. Rev. Stat. Ann. §40-5-1 (Supp. 1967) (armed with intent, if resisted, to kill or injure; wounds or threatens injury with weapon; with armed confederate; robbery of bus driver); Hawaii Rev. Laws §§ 306-8-11 (1955) (armed with intent to kill or wound, if resisted; or does wound, strike, or severely injure); Ill. Ann. Stat., ch. 38, §18-2 (Smith-Hurd 1964) (armed); Ind. Ann. Stat. §10-4101 (1956) (with injury); La. Rev. Stat., tit. 14, §64 (Supp. 1967) (armed: 1-99 years); Mich. Comp. Laws Ann. §750.529 (1968) (armed; aggravated assault; serious injury); Ore. Rev. Stat. §163.280 (1967) (armed); W. Va. Code Ann. §61-2-12 (1966) (by strangulation, beating, or violence to person; by threat of deadly weapon).

The remaining twelve states provide for maximum punishments for aggravated robbery of terms from twenty to fifty years. Iowa Code Ann. §711.2 (1950) (25 years: armed with intent to maim if resisted or confederate so armed; strikes victim); Kan. Gen. Stat. Ann. §21-527 (1964) (21 years maximum: by violence or fear of immediate injury); Md. Ann. Code, art. 27, §488 (1957) (20 years maximum: armed); Minn. Stat. Ann. §609.245 (1964) (20 years maximum: armed; injures victim); N.M. Gen. Stat. §§40A-16-2, 40A-29-3 (50 years maximum: armed); N.Y. Pen. Law §§160.15, 70.00 (1967) (25 years maximum: serious injury; armed; uses or threatens with weapon); N.C. Gen. Stat. §14-87 (1953) (30 years maximum: armed); Pa. Stat. Ann., tit. 18, §4705 (20 years maximum: armed or with accomplice; by violence); S.C. Code Ann. §16-333 (Supp. 1967) (25 years maximum: armed with deadly weapon); Vt. Stat. Ann., tit. 13, §603 (20 years maximum: with armed assault); Wisc. Stat. Ann. §943.32 (1958) (30 years maximum: armed with dangerous weapon); Wyo. Stat. Ann. §6-66 (1959) (50 years maximum: with deadly weapon).

The status of capital punishment generally in the United States is described in Appendix A to this brief. See also Bedau 39-52;

Alabama has used it—*irregularly, unfairly, unevenly* and arbitrarily—to execute *five* men in *thirty-nine* years, capital punishment for robbery palpably has no such valid function."[55]

(10) We must conclude, then, that the death penalty for robbery imposed by Alabama upon Edward Boykin is no part of the regular criminal-law machinery of the State. It is a freakish aberration, a rare, extreme act of violence, visibly arbitrary, probably racially discriminatory—a penalty reserved for wholly arbitrary application because, if it were regularly used against robbers, it would affront universally shared standards of public decency. Such a penalty—not Law, but Terror—is the instrument of totalitarian government. It is a cruel and unusual punishment, forbidden by the Eighth Amendment.

NPS (1968), pp. 80-82; 108 CONG. REC. 3300-3305, 87th Cong., 2d Sess. (March 1, 1962).

It appears that, outside of the United States also, capital punishment for robbery is seldom legally available. In 128 nations surveyed, Patrick found that 18 had laws punishing some form of robbery (usually an aggravated form) capitally. *Patrick* 398-404, 409. This is a somewhat larger number than reported in UNITED NATIONS 41.

[55] This is a characteristic of cruel and unusual punishments. "[W]henever social progress outpaces the Law, so that its penalties appear disproportionately severe to the public conscience, juries become reluctant to convict [or to impose the penalty], and reprieves, instead of being an exceptional act of mercy, become virtually the rule, so that only a small proportion of the sentences are actually carried out and the threat accordingly loses its deterrent effect." KOESTLER 86. See BEDAU 31, 33, 270; MATTICK 16.

III.

The Alabama Procedure Under Which Boykin Was Sentenced to Die in the Unregulated, Lawless Discretion of the Jury Violates the Rule of Law Basic to Due Process.

We noted in Part II of this brief that the principal legal device by which Alabama (like most States) permits the arbitrary administration of capital punishment is unrestricted jury discretion. Our present submission attacks the constitutionality of the device. The discretion given Alabama jurors to sentence men whom they convict of robbery to live or die is absolute. It is totally unguided, unprincipled, unconstrained, uncontrolled, and unreviewable. We invite the Court's attention, once again, to the fashion in which the decision to take Edward Boykin's life was submitted to the jury. Pp. 13-14, *supra*. The trial judge simply gave the jurors two forms—a form for life and a form for death—and told them: "You can use either one form or the other when you arrive at your verdict." App. 32.

We think there can be no doubt about the unconstitutionality of such a procedure. We have made the argument to the Court before,[46] and we urge it again here. Just last month, it was rejected by the Supreme Court of California by a four-to-three vote. The California opinions are attached as Appendix B hereto. With deference, we submit that Justice Tobriner's dissenting opinion, in which Chief Justice Traynor and Justice Peters concur, states the law of the Fourteenth Amendment. It does so with uncomparable lucidity, and we hope that it will be read by this Court.

[46] See the documents cited in note 7, para. (2), *supra*.

The issues to which it speaks could not be more important or more fundamental. For, whatever else "due process of law" may encompass, it has always been thought to impose some demand of fundamental procedural regularity in decision-making, some insistence upon the rule of law, some adherence to the principle established by Magna Carta that the life and liberty of the subject should not be taken but by the law of the land. This Court has long condemned the sort of vagueness in criminal statutes that "licenses the jury to create its own standard in each case," *Herndon* v. *Lowry*, 301 U.S. 242, 263 (1937). See *e.g.*, *Smith* v. *Cahoon*, 283 U.S. 552 (1931); *Cline* v. *Frink Dairy Co.*, 247 U.S. 445 (1927); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926); *Winters* v. *New York*, 333 U.S. 507 (1948). The vice of such statutes is not alone their failure to give fair warning of prohibited conduct, but the breadth of room they leave for jury arbitrariness and the influence of impermissible considerations, *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432-433 (1963); *Freedman* v. *Maryland*, 380 U.S. 51, 56 (1965); Lewis, *The Sit-In Cases: Great Expectations*, 1963 Supreme Court Review 101, 110; Note, 109 U. Pa. L. Rev. 67, 90 (1960), including racial considerations, see *Louisiana* v. *United States*, 380 U.S. 145 (1965); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Cox* v. *Louisiana*, 379 U.S. 536 (1965), and every other insidious urging of caprice or prejudice.

Under these decisions, it could scarcely be contended that an Alabama statute would be valid which provided: "whoever is found condemnable in the discretion of a jury shall be guilty of an offense." Yet we submit that this suppositious statute stands no differently in light of the concerns of the Due Process Clause than the unregulated sentencing practice under which petitioner was condemned to die. The statute, it is true, deals with crime, and Alabama's sentenc-

ing practice with punishment. But a practice that jeopardizes the integrity and reliability of the sentencing process is as unconstitutional as one that similarly affects the guilt-determining process. *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968); *Mempa* v. *Rhay*, 389 U.S. 128 (1967); *McConnell* v. *Rhay* and *Stiltner* v. *Rhay*, 37 U.S. L. Week 3131 (U.S., Oct. 14, 1968). In *Witherspoon*, 391 U.S. at 521 n. 20, this Court noted that while sentencing choice—and, in particular, the choice of life or death may be:

> "different in kind from a finding that the defendant committed a specified criminal offense, . . . this does not mean that basic requirements of procedural fairness can be ignored simply because the determination involved in this case differs in some respects from the traditional assessment of whether the defendant engaged in a proscribed course of conduct."

Traditionally, of course, it may have been thought that "fair notice" questions were raised by regulations defining offenses but not by those prescribing punishment. Yet, is it not apparent that the vice of the "whoever-is-found-condemnable" statute has little to do with notice? The statute is bad not because a man does not know how to behave consistently with it, but because, *however he behaves, he may be arbitrarily and capriciously taken by the heels.* The precise vice inheres in unregulated jury discretion to sentence a convicted robber to life or death. He too may be dealt with arbitrarily, his life extinguished for any reason or none. Surely he is, at the same time, under Alabama's single verdict practice, found guilty of a defined crime. That conviction, however, cannot constitutionally be given the effect of stripping him of every civil right, including the fundamental right to due process of law. E.g., *Specht* v. *Patterson*, 386 U.S. 605 (1967).

Giaccio v. *Pennsylvania*, 382 U.S. 399 (1966), supports, if it does not compel, the conclusion that unfettered jury discretion in capital sentencing is unconstitutional. What was at issue there, as here, was a state practice governing disposition. No "fair notice" problem was involved—except, of course, the problem, noted by the Court, that it was impossible for defense counsel at trial to know what issues he was trying, as it is in a capital case tried to a jury having limitless sentencing power.[57] That decision turned squarely on the proposition that the Fourteenth Amendment forbade Pennsylvania to leave its "jurors free to decide, without any legally fixed standards," 382 U.S. at 402-403, whether to impose upon a defendant a rather small item of costs.[58] It is not evident why, in the infinitely more significant matter of sentencing men to death, Alabama juries can be permitted the same lawless and standardless freedom.

Nor does footnote 8 in the *Giaccio* opinion blunt the implications of the *Giaccio* holding for our present purposes. In that footnote, a majority of this Court noted that it intended to cast no doubt on the constitutionality of leaving to juries finding defendants guilty of a crime the power to fix punishment "within legally prescribed limits." The precise problem in this case is that there were no "legally prescribed limits," in any realistic sense, to

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[57] The Court noted specifically that the problem of fair notice was only one of the problems with vague, standardless laws:

> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits *or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.*" (382 U.S. at 402-403; emphasis added.)

[58] No First Amendment or other federal rights demanding the special protection afforded by a heightened requirement of statutory specificity, see *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29, 36 (1963), were involved in *Giaccio*.

the jury's discretion. Further, that footnote speaks to jury sentencing generally, not capital sentencing.

> "It should be understood that much more is involved here than a simple determination of sentence. The State . . . empowered the jury in this case to answer 'yes' or 'no' to the question whether this defendant was fit to live." (*Witherspoon* v. *Illinois*, 391 U.S. 510, 521 n. 20 (1968).)

Given the imprecision of the sentencing art, even when performed by judges, see *Tigner* v. *Texas*, 310 U.S. 141, 148-149 (1940), it may well be that juries can constitutionally be given some discretion in selecting a smaller or larger fine, a longer or shorter term of years, particularly where the range of choice is relatively circumscribed and the effect of the choice somewhat qualified by parole statutes and the continuing availability of post-conviction process to rectify after-discovered mistakes made at the trial. But the degree of arbitrariness allowed a State is not so liberal where grave and irremediable punitive exactions are at stake, see *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); and none is graver or more irremediable than the sentence of death by electrocution.

Nor did the Court in *Giaccio* have before it what has been presented here: evidence that in fact the sentencing discretion given juries has been exercised arbitrarily. See Part II, *supra*, of this brief. We do not hesitate to contend that the arbitrary and standardless discretion afforded Alabama juries constituted *per se* a deprivation of Boykin's constitutional rights. But evidence that abuse has in fact occurred in its administration—that only five men, all Negro, have been sent to death for robbery in the past thirty-eight years in this State—has considerable bearing on the issue whether a practice challenged on the grounds

of lawlessness tending to abuse is susceptible to that challenge, e.g., *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Louisiana* v. *United States*, 380 U.S. 145 (1965).

We do not contend here that the Due Process Clause forbids entirely the exercise of discretion in sentencing—even by a jury and even in a capital case. Ways may be found to delimit and guide discretion, narrow its scope, and subject it to review; and these may bring a grant of discretion within constitutionally tolerable limits. Whether the approach taken by a State such as Nevada, which makes certain reviewable findings of fact the indispensable condition of imposing capital punishment (see Nev. Rev. Stat. §200.363 (1967)); or the approach of California, which has adumbrated by judicial decision at least some of the impermissible considerations against which jurors are to be cautioned (see *People* v. *Love*, 53 Cal.2d 843, 350 P.2d 705 (1960)); or that of the Model Penal Code, which both establishes prerequisite findings and enumerates aggravating and mitigating circumstances (see AMERICAN LAW INSTITUTE, MODEL PENAL CODE, §210.6 (P.O.D. May 4, 1962), pp. 128-132); or that of the numerous States which provide plenary review of capital jury sentencing by trial and/or appellate courts, would be constitutional, is not the question presented. Concededly, the goals of sentencing are complex and in designing devices for achieving them the States must have some tolerance.

But as the issue of petitioner's sentence was submitted to the jury in its sole discretion under Alabama procedure, the attention of the jurors was directed to none of the purposes of criminal punishment, nor to any pertinent aspect or aspects of the defendant's conduct. They were not

invited to consider the extent of harm to the robbery victims, the moral heinousness of the defendant's acts, his susceptibility or lack of susceptibility to reformation, the extent of the deterrent effect of killing the defendant *"pour décourager les autres."* Cf. Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071 (1964). They were permitted to choose between life and death upon conviction for any reason, rational or irrational, or for no reason at all; at a whim, a vague caprice, or because of the color of Boykin's skin. In making the determination to impose the death sentence, they acted wilfully and unreviewably, without standards and without direction. Nothing assured that there would be the slightest thread of connection between the sentence they exacted and any reasonable justification for exacting it. Cf. *Skinner* v. *Oklahoma, supra.* To concede the complexity and interrelation of sentencing goals, see *Packer, supra,* is no reason to sustain a procedure which ignores them all. It is futile to put forward justification for a death so inflicted; there is no assurance that the infliction responds to the justification or will conform to it in operation. Inevitably, under such a sentencing regime, capital punishment in those few, arbitrarily selected cases where it is applied, is both unjustifiable and lawless, and, as shown by Alabama's record, pp. 53-54, *supra,* conventionally imposed only on the members of minority groups.

We submit that its imposition in the unfettered discretion of a jury violates the rule of law that is fundamental to Due Process.

IV.

Issues Not Presented

Before closing this brief, we think it is imperative to notice explicitly several issues which, in our judgment, the Court is not now called upon to decide. We venture with the utmost deference to identify these issues because of their extreme importance to the many condemned men whom we represent. Numerous of these men have stays of execution granted upon post-conviction petitions raising the issues. If, as we submit, none of the issues is presented in this *Boykin* case, we know that the Court would not want inadvertently to prejudice their subsequent presentation. Because of the nature of the issues and their relation to those briefed herein, there is some danger of this if we are negligent in failing to bring to the Court's attention precisely what these issues are.

First, the Court is not now called upon to determine whether the death penalty is cruel and unusual punishment for the crime of murder. Most of the men on death row today are there for murder, and they are presenting to a number of courts varying contentions attacking their death sentences under the Eighth Amendment. Some of these contentions stress the physical and psychological cruelties of execution, or its indignities; others focus upon the fortuity and apparent purposelessness of its application; still others press the unnecessary severity of capital punishment in view of the alternative means available to the state for achieving all of the legitimate ends of criminal sanctioning, either in particular cases or generally. We note that one of the very convincing points made by counsel for Boykin is that the death sentence for robbery is constitutionally disproportionate. Our own Eighth Amend-

ment argument in support of Boykin takes a different approach. See part II, *supra*, of this brief. But, if the Court should see fit to adopt reasoning of proportionality in applying the Eighth Amendment to Boykin's case, we earnestly hope that it will make clear what a proportionality rationale does not imply. Specifically, if the death penalty violates the Eighth Amendment because it is disproportionately severe for the crime of robbery, that does not imply that the death penalty is constitutionally acceptable for the crime of murder.

This is so for at least two reasons. (1) Even were proportionality theory the full measure of the Eighth Amendment, this Court is not now in a position to determine whether the death penalty is proportioned to the crime of murder. The determination that it is disproportioned to robbery does not necessarily establish that it is proportioned to murder; and there are some very good reasons to believe that it is not. A few reasons are suggested at pp. 33-35, *supra*, but they can hardly be adequately developed or considered in a case where the issue is not presented. (2) In any event, though proportionality be one command of the Eighth Amendment, it is surely not the sole command of the Eighth Amendment. Court-ordered maiming is arguably proportioned to the crime of mayhem, but we have no doubt that maiming would be held to violate the prohibition of cruel and unusual punishments. So, if the death penalty is unconstitutional when disproportioned, it is not thereby constitutional when proportioned. Other Eighth Amendment principles may yet condemn it.

Second, and in the same vein, the Court is not now called upon to determine whether the death penalty might be shown to be a cruel and unusual punishment on other grounds than those urged here, and on another record; nor to determine the right of a condemned man to make

such a record. In this connection, we note that we have been seeking in various courts the opportunity for an evidentiary hearing at which expert testimony relating to the actual physical and psychological effects of capital punishment might be received, together with similar testimony relating to the validity of the several state interests usually asserted to justify the state-ordered executions which have these effects. The refusal of one court to allow us such a hearing is at issue in one pending petition for certiorari here. *Forcella and Funicello* v. *New Jersey*, O.T. 1968, No. 947 Misc.

Whatever the disposition of that particular petition, we would hope that courts will not universally and perpetually decline to hear constitutionally relevant evidence. But no such evidence is contained in the remarkably spare *Boykin* record, and none was proffered by Boykin's court-appointed counsel. We think it important that this be made clear, so that nothing in the Court's deliberations here prejudices the right to offer evidence of the sort described, or prejudges the constitutional case which could be made by evidence.

Third, Boykin's petition for certiorari presents as a distinct question (number 6 among the Questions Presented) a claim of racial discrimination in the application of the death penalty to Alabama Negroes. In Boykin's brief, the claim and the evidence supporting it are put forward as part of his argument that the death penalty, in his case, is a cruel and unusual punishment. We agree that the apparent racial discrimination in the selection of the few, otherwise arbitrarily chosen men sentenced to die for robbery in Alabama and the handful of Southern States which retain capital punishment for this crime is highly relevant to the claim of cruel and unusual punishment, for reasons which we have developed in Part II, *supra*, of this brief. Racial

discrimination also appears to us germane to Boykin's contention that unfettered jury discretion in capital sentencing violates the rule of law fundamental to the Due Process Clause, as we have shown in Part III, *supra*.

But these submissions—properly resting upon evidence of racially differencial sentencing less exact and scientific than that which would be proffered to support a claim of discrimination under the Equal Protection Clause—should not be confused with the latter claim. Judicially noticeable indications of pervasive racial discrimination in the administration of the death penalty throughout the United States abound (see pp. 51-53, *supra*), and are quite legitimately noticed as matters of "constitutional fact" going to the Eighth Amendment argument. They would not generally, and without more, suffice to prove an out-and-out Equal Protection violation by a particular State, under *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

Elaborate—and exceedingly expensive—scientific research efforts may, however, result in proof which (together with the noticeable publications) amply carries the day under the Equal Protection Clause. Our Petition for Certiorari, in *Maxwell* v. *Bishop*, O.T. 1968, No. 622, submits that such a case was proved in Arkansas relating to capital sentencing for the crime of rape. A still more convincing case might be made in Alabama with regard to capital rape sentencing. But that evidence is not in this record. We have pointed out above that—apart from the fact that its procurement would have been beyond Boykin's resources—scientific analysis of racial patterns for capital *robbery* sentencing in Alabama would be virtually impossible, by reason of the infinitesimally small number of persons sentenced to death for robbery in that State (or any State) in recent years. This latter circumstance highlights the force of Boykin's contention under the Cruel and Un-

usual Punishment Clause; it also makes imperative an appreciation of the distinction between the Eighth Amendment contention and an Equal Protection claim.

Finally, Boykin's petition for certiorari presents (as question number 4 among the Questions Presented) a constitutional challenge to the "unitary" or single-verdict method of trying the issues of guilt and punishment in a capital case. On a proper record, that question would be a very substantial one. See the petitions for certiorari in the *Johnson, Mathis* and *Maxwell* cases, cited at note 7, para. (3), *supra.*

But the issue is not briefed by counsel for Boykin, for the reason, we would think, that it is hardly presented on this record. Boykin pleaded guilty; and, for aught that appears, the jury trial which followed his plea was for the sole purpose of fixing punishment. At the most, the guilt question was tried in a formal sense, on judicial confession.

And so—although, again, Boykin's case might look different on a different record—it is apparent that the present record raises no question of the constitutionality of trying guilt and punishment simultaneously in a capital case. That question will properly arise in a capital case where guilt is tried.

CONCLUSION

Edward Boykin's guilty plea was accepted without the safeguards required by the Due Process Clause. His sentence to death for the crime of robbery violates the Eighth Amendment's prohibition of cruel and unusual punishment. The method by which his sentence was determined, in the unregulated and lawless discretion of the jury, violates the rule of law fundamental to due process. The judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

Provisions of the Criminal Statutes of the Fifty American States Providing for the Punishment of Death:

ALABAMA

Code of Ala., (Recomp. Vol. 1958): §14-7 (kidnapping for ransom); §14-8 (attempted kidnapping for ransom); §14-23 (first degree arson with loss of life or maiming); §14-24 (second degree arson with loss of life or maiming); §14-39 (assault on prison guard or any murder by life term prisoner); §14-84 (burglary); §14-97 (sabotage); §14-123 (dynamiting under or near inhabited area); §14-315 (killing in duel); §14-316 (killing with concealed weapon); §14-318 (murder); §14-355 (lynching); §14-395 (rape); §§14-397, 14-398 (carnal knowledge); §14-415 (robbery); §14-416 (train robbery); §14-424 (treason).

ARIZONA

A.R.S., (1956): §13-250 (armed assault by life term prisoner); §13-453 (murder); §13-492 (kidnapping for ransom where victim is harmed); §13-572 (perjury in capital case resulting in death of innocent person); §13-644 (train robbery); §13-701 (treason).

ARKANSAS

Ark. Stat. Ann., (1947): §41-502 (arson of prison by convict); §41-2213 (killing in duel); §41-2214 (captain of boat causing death by deliberately ramming into craft); §41-2216 (police officer causing death by exceeding bounds of moderation); §41-2223 (causing death of woman by abortion); §41-2227 (murder); §41-2304 (kidnapping for ransom or victim harmed); §41-3403 (rape); §41-3405 (carnal knowledge of woman intentionally drugged); §41-3411 (forcing woman to marry).

Appendix A

CALIFORNIA

West's Ann. Cal. Penal Code (1954): §37 (treason); §128 (perjury in capital case resulting in death of innocent person); §190 (murder); §209 (kidnapping for ransom or robbery where victim is harmed); §219 (train wrecking); §4500 (armed assault by life term prisoner).

COLORADO

Col. Rev. St. (1963): §40-2-3 (murder); §40-2-45 (kidnapping where victim suffers bodily harm); §40-2-51 (causing death of woman by abortion); §40-7-3 (perjury in capital case resulting in death of innocent victim); §40-7-49 (armed assault by escaped life prisoner); §40-23-14 (causing death during commission of criminal anarchy).

CONNECTICUT

C.G.S.A. (1967): §53-1 (treason); §53-3 (killing president or ambassador); §53-10 (causing death by train wrecking); §53-10 (causing death by arson or bombing); §53-10 (murder); §53-27 (killing kidnap victim).

DELAWARE

11 Del. C. (1967 Cum. Supl.): §107 (murder).

FLORIDA

F.S.A. (1965): §782.04 (murder); §782.05 (killing in duel); §782.06 (causing death by train wrecking); §790.16 (throwing bombs or discharging machine gun in public place); §790.161 (throwing bombs damaging private property where death results); §794.01 (rape or carnal knowledge where victim under ten); §805.02 (kidnapping for ransom).

Appendix A

GEORGIA

Ga. Code Ann. (1953): §26-801 (treason); §26-903 (insurrection including attempts); §26-1[illegible]05 (murder); §26-1103 (feticide); §26-1104 (advising woman to kill child before birth or after delivery); §26-1208 (castration); §26-1302 (rape); §26-1304 (carnal knowledge where victim under fourteen); §26-1603 (kidnapping for ransom); §26-2204 (burning or attempting to burn railroad bridge); §26-2206 (arson resulting in death); §26-2301 through §26-2303 (dynamiting inhabited structure); §26-2502 (armed robbery); §26-4007 (perjury in capital case resulting in death of accused); §26-5203 (killing in duel); §26-5401 (mob violence resulting in death); §26-7314 (train wrecking resulting in death); §26-7320 (causing death by mishandling poisonous reptiles); §26-8117 (desecration of burial place with intent to rob, molest or mutilate).

IDAHO

Ida. Code (1947): §18-4004 (murder); §18-4504 (kidnapping for ransom where victim harmed); §18-5411 (perjury in capital case resulting in death of innocent person); §18-6007 (causing death by train wrecking).

ILLINOIS

Ill. Ann. St., (1961): c. 38, §9-1 (murder); c. 38, §10-2 (kidnapping for ransom); c. 38, §30-1 (treason).

INDIANA

Burns Ind. St. (1956): §10-307 (arson causing death); §10-3306 (mob lynching causing death); §10-3401 (murder); §10-3402 (killing in duel); §10-3902 (causing death by train wrecking); §10-2903 (kidnapping for ransom); §10-4401 (treason).

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KANSAS

K.S.A. (1963): §21-201 (treason); §21-403 (murder); §21-449 (kidnapping for ransom where victim harmed); §21-702 (perjury in capital case resulting in death of accused).

KENTUCKY

Ky. Rev. Stat. Ann. (1963): §433.10 (armed robbery or armed burglary); §433.150 (assault to rob or intent to rob); §433.390 (causing death by train wrecking); §435.010 (murder); §435.040 (causing death of woman by abortion); §435.030 (killing during advocacy of criminal syndicalism); §435.070 (lynching); §§435.080 435.090 (rape); §435.140 (kidnapping for ransom); §435.190 (reckless shooting into train or motor vehicle).

LOUISIANA

L.S.A. (1950): §14:30 (murder); §14:42 (aggravated rape); §14:44 (aggravated kidnapping); §14:113 (treason).

MARYLAND

Ann. Code of Md. (1957): §27-12 (assault with intent to commit rape); §27-337 (kidnapping); §27-410 (killing any person while attempting to escape prison); §27-413 (murder); §27-453 (causing death by train wrecking); §27-461 (rape); §27-462 (carnal knowledge of child under fourteen).

MISSISSIPPI

Miss. Code Ann. (Recomp. Vol. 1956): §2096 (killing in duel); §2143 (bombing in or near inhabited area); §2217 (murder); §2222 (causing death of woman by abortion);

§2238 (kidnapping); §2358 (rape including attempts); §2367 (armed robbery); §2397 (treason).

MISSOURI

Vernon's Mo. Stat. Ann. (1953): §557.020 (perjury in capital case resulting in death of accused); §559.030 (murder); §559.230 (kidnapping for ransom); §559.260 (rape); §559.300 (carnal knowledge under sixteen); §560.135 (armed robbery); §560.140 (train robbery); §562.010 (treason); §564.560 (bombing).

MONTANA

Rev. Code of Mont. (1947): §94-2505 (murder); §94-2601 (kidnapping for ransom); §94-3207 (causing death by train wrecking); §94-3207, §94-3813 (perjury in capital case resulting in death of innocent person); §94-4501 (treason).

NEBRASKA

Neb. Rev. St. (1943): §28-401 (murder).

NEVADA

N.R.S. (1967): §196.010 (treason); §199.160 (perjury resulting in death of innocent person); §200.030 (murder); §200.363 (rape with substantial bodily harm); §200.320 (kidnapping for ransom with bodily harm to victim); §200.400 (assault with intent to rape accompanied with acts of violence and bodily harm); §200.410 (killing in duel); §202.270 (dynamiting); §212.060 (life prisoner killing any person while attempting escape).

NEW HAMPSHIRE

N.H. Rev. St. Ann. (1955): §585.4 (murder).

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NEW JERSEY

N.J. Stat. Ann. (1939): §2A:113-4 (murder); §2A:118-1 (kidnapping for ransom); §2A:148-1 (treason); §2A:148-6 (attempt or conspiracy to assault chief of state).

NEW MEXICO

N. Mex. St. (1964 Repl. Vol.): §40A-2-1 (murder); §40A-4-1 (kidnapping for ransom with bodily harm).

NEW YORK

McKinney's Con. Penal Laws (1967): §125.60 (murder of police officer or by life term prisoner).

NORTH CAROLINA

Gen. St. of N.C. (1953): §14-17 (murder); §14-20 (killing in duel); §14-21 (rape); §14-52 (burglary); §14-58 (arson); §14-278 (causing death by train wrecking).

OHIO

Rev. Code Ann. (1953): §2901.01 (murder); §2901.02 (causing death by train wrecking); §2901.03 (convict killing guard); §2901.04 (killing police officer on duty); §2901.09 (killing federal or state chief of state); §2901.27 (kidnapping for ransom); §2901.28 (abduction resulting in death).

OKLAHOMA

Okla. St. Ann. (1958), Tit. 21: §707 (murder); §745 (kidnapping for ransom); §801 (armed robbery); §1115 (rape).

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PENNSYLVANIA

Purdon's Pa. St. Ann. (1962): §4701 (murder); §4710.2 (assault with intent to kill by life term prisoner); §3765 (lynching); §4919 (causing death by train wrecking).

SOUTH CAROLINA

S.C. Code Ann. (1962): §16-52 (murder); §16-54 (killing by stabbing); §16-57 (lynching); §16-63 (killing in duel); §§16-72, 16-80 (rape as well as assault with attempt to rape, also carnal knowledge); §16-91 (kidnapping where victim is not released alive before trial); §16-92 (conspiracy to kidnap); §17-553 (third conviction for crimes optionally punishable by death); §§44-353, 44-354 (giving information or aiding enemy in time of war).

SOUTH DAKOTA

S.D. Code of 1939: §13.2012 (murder); §13.2701 (kidnapping where victim is bodily harmed).

TENNESSEE

Tenn. Code Ann. (1955): §39-2405 (murder); §39-2603 (kidnapping for ransom); §39-2803 (assault with deadly weapon while in disguise); §39-3702 (rape); §§39-3703 through 39-3706 (carnal knowledge); §39-3901 (armed robbery).

TEXAS

Tex. Pen. Code Ann. (1961): §33 (instigation of a minor by a relative or spouse to commit a capital crime); §84 (treason); §309 (perjury in capital case resulting in an execution); §1177(a) (kidnapping for ransom); §1183 (carnal knowledge); §1189 (rape); §1257 (murder); §1260a (lynching); §1408 (armed robbery).

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UTAH

Utah Code Ann. (1953): §76-7-12 (armed assault by life term prisoner); §76-16-2 (killing in duel); §76-30-4 (murder); §76-35-1 (kidnapping for ransom).

VERMONT

13 V.S.A. (1968 Cum. suppl.): §2303 (second first degree murder offense and murder of prison guard or police officer).

VIRGINIA

Code of Va. (Repl. Vol. 1960): §18.1-16 (attempt to commit rape); §18.1-22 (murder); §18.1-38 (kidnapping for ransom or immoral purposes); §18.1-44 (rape and carnal knowledge); §18.1-75 (arson); §18.1-86 (burglary); §18.1-90 (armed bank robbery); §18.1-91 (aggravated robbery); §18.1-259 (machine gun used in perpetration of crime of violence); §18.1-418 (treason).

WASHINGTON

R.C.W.A. (1961): §9.48.030 (causing death by train wrecking); §9.48.030 (murder); §9.2.010 (kidnapping for ransom); §9.82.010 (treason).

WYOMING

Wyo. St. (1957): §6-54 (murder); §6-56 (killing in duel); §6-59 (kidnapping for ransom or robbery where victim harmed); §6-61 (child stealing); §37-248 (causing death by train wrecking or boarding train with intent to commit a felony).

APPENDIX B

IN THE

SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

Crim. 11572

In re ROBERT PAGE ANDERSON
on Habeas Corpus.

Crim. 11573

In re FREDERICK SATERFIELD
on Habeas Corpus.

(Two Cases)

[*Opinion by Burke, J.*]

The issue here presented is whether the death penalty and the procedures followed in imposing it are constitutional, and not whether it should be retained or abolished in California. Retention or abolition raises a question of legislative policy which under our system of division of powers falls within the competence of the Legislature or the electorate.

A jury found Frederick Saterfield guilty on two counts of first degree murder and fixed the penalty on each count at death; the judgment was affirmed (*People* v. *Saterfield*, 65 Cal.2d 752 [cert. den. 389 U.S. 942 and 964]). A jury also found Robert Page Anderson guilty of first degree murder, attempted murder of three other men, and first

degree robbery, and fixed the penalty at death for the murder; the judgment was affirmed (*People* v. *Anderson*, 64 Cal.2d 633).

Saterfield and Anderson now seek habeas corpus on the grounds that (1) it was improper to excuse for cause veniremen conscientiously opposed to the death penalty; (2) Penal Code sections 190 and 190.1 are unconstitutional because they contain no standards to assist the trier of fact in determining whether to impose death or life imprisonment; (3) the death penalty, per se and as applied, constitutes cruel and unusual punishment; and (4) petitioners have been denied their right to counsel in post-state-appeal proceedings. We issued orders to show cause and pending final determination of the instant proceedings stayed all judgments of death in California. Counsel in all pending automatic appeals and other attorneys were afforded an opportunity to file amicus curiae briefs, in which additional arguments have been presented challenging the constitutionality of the death penalty as applied in California.

We hold that the death penalty is constitutional and does not constitute cruel or unusual punishment, that Penal Code sections 190 and 190.1 are valid, and that in keeping with a newly declared policy of this court petitioners, and all other indigent defendants in capital cases, in the interests of justice, will be afforded the services of counsel in all proceedings between the termination of their state appeals and their execution. We have further concluded that under the compulsion of the June 3, 1968, decision of the United States Supreme Court in *Witherspoon* v. *Illinois*, 391 U.S. 510, the death penalties in the two cases now before us must be set aside because certain prospective jurors were improperly excused for cause. It is necessary, therefore,

that petitioners be remanded to the trial courts for new trials limited to the issue of penalty.

Excusing Veniremen Opposed To Death Penalty

Petitioners argue that excusing for cause veniremen conscientiously opposed to the death penalty deprived them of a jury which fairly represented a cross section of the community and tended to assure the state a jury whose members were favorable to the prosecution at each phase of the trial. At Saterfield's trial two prospective jurors were excused for cause on the ground of their opposition to the death penalty. Likewise at Anderson's trial seven prospective jurors and one prospective alternate juror were excused for cause on that same ground.

At each trial one or more of the prospective jurors excused on that ground did not make it "unmistakably clear (1) that [he] would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial . . . or (2) that [his] attitude toward the death penalty would prevent [him] from making an impartial decision as to the defendant's guilt," as mandated by the *Witherspoon* decision. (391 U.S. 510, 522-523, fn. 21.) For example, at Saterfield's trial one prospective juror stated, "I am opposed to the death penalty," and was thereupon excused for cause; at Anderson's trial one prospective juror in response to the question "Do you know of any reason you couldn't be a fair and impartial juror in this case?" replied, "Yes, sir, I do. I don't believe in capital punishment" and was immediately excused for cause. In neither instance had the court made it clear to that particular prospective juror that opposition to the death penalty or conscientious scruples against that penalty would be insufficient by itself to disqualify such a juror

from serving. This is not surprising, because the trials preceded the decision of the United States Supreme Court in *Witherspoon* v. *Illinois, supra,* 391 U.S. 510, which sets forth new rules that the states are not only compelled to follow but must apply retroactively (see fn. 22, at p. 523).

Witherspoon held "that a sentence of death can not be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon* further stated that "No defendant can constitutionally be put to death at the hands of a tribunal so selected" but that "nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt.*"

Witherspoon, therefore, requires us to set aside the death penalties imposed on petitioners and to have the issue of penalty retried. There is no merit to the Attorney General's contention that, since, assertedly, the California law at the time of petitioners' trials was not materially different from the rules in *Witherspoon*, defense counsels' failure to object to the exclusion of the prospective jurors in question bars petitioners from now claiming error. At the time of petitioners' trials, under decisions interpreting Penal Code section 1074, subdivision (8), it was proper to excuse for cause prospective jurors who "did not believe in capital

punishment" or who were "conscientiously opposed to capital punishment" as well as those "whose consciences would preclude them from imposing [the death penalty]." (E.g. *People* v. *Shipp*, 59 Cal.2d 845, 853 [cert. den. 377 U.S. 999]; *People* v. *Love*, 56 Cal.2d 720, 726; *People* v. *Duncan*, 53 Cal.2d 803, 816 [pet. for cert. granted, 363 U.S. 840; writ dismissed 366 U.S. 417]; *People* v. *Wein*, 50 Cal.2d 383, 394 [cert. den. 358 U.S. 866]; *People* v. *Riser*, 47 Cal.2d 566, 573-576 [app. dism. 358 U.S. 646]; *People* v. *Hoyt*, 20 Cal.2d 306, 316; *People* v. *Kynette*, 15 Cal.2d 731, 744-745 [cert. den. 312 U.S. 703]; see *People* v. *Carter*, 56 Cal.2d 549, 573, fn. 10.) It is obvious that *Witherspoon* made a material change in the law in this state. Since petitioners were tried before *Witherspoon*, failure to object to the exclusion of the prospective jurors in question does not bar petitioners from now claiming error. (Cf. *People* v. *Nye*, 63 Cal.2d 166, 175; *People* v. *Love*, *supra*, 56 Cal.2d 720, 731-732; *People* v. *Kitchens*, 46 Cal.2d 260, 262-263.)

The Attorney General also contends that any error under *Witherspoon* in excusing for cause prospective jurors opposed to the death penalty is nonprejudicial where, as here, the prosecution had sufficient peremptory challenges to remove all such jurors. The Attorney General asserts that since the chances of a jury's being able to determine the penalty impartially are diminished if the jury contains even one person who is hostile to, or has reservations concerning, the death penalty, it may be assumed that, if the challenges for cause had not been available, the prosecutors would have excluded the veniremen in question by way of peremptory challenge; that a prosecutor may constitutionally exercise his peremptory challenges in a particular case for any purpose he deems proper (*Swain* v. *Alabama*, 380 U.S. 202, 221-222); and that therefore any error in exclud-

ing for cause the veniremen in question did not affect the composition of the juries at petitioners' trials and is not a ground for vacating the death sentences.

We do not agree. *Witherspoon* did not discuss the effect of the existence of remaining peremptory challenges of the *prosecution*, but the broad language of the opinion establishes without doubt that in no case can a defendant be put to death where a venireman was excused for cause solely on the ground he was conscientiously opposed to the death penalty. According to our understanding of *Witherspoon*, reversal is automatically required a venireman was improperly excused for cause on the basis of his opposition to the death penalty. It may be noted that in *Witherspoon* the *defense* had three remaining peremptory challenges when it accepted the jury, but that fact was not viewed as showing that the jurors who were impaneled were impartial and that therefore no harm resulted from improperly excusing for cause some prospective jurors. Furthermore, in arguing that it may be assumed that the prosecutor would have used his peremptory challenges to remove veniremen who under *Witherspoon* were improperly excused for cause, the Attorney General bases his argument on a concept of an impartial jury that is in conflict with the majority opinion in *Witherspoon*. Under the view of the *Witherspoon* majority a jury from which all prospective jurors opposed the death penalty have been excluded is not an impartial jury but rather constitutes a "hanging jury," one that is "uncommonly willing to condemn a man to die," and one that "cannot speak for the community" but "can speak only for a distinct and dwindling minority." We cannot engage in conjecture that the prosecutor would have used his peremptory challenges to excuse all such jurors.

Appendix B

Witherspoon left undecided the question whether the exclusion of veniremen opposed to capital punishment necessitates setting aside the judgment as to guilt. The opinion noted (fn. 11, p. 517) that during the post-conviction proceedings there under review no request was made to submit evidence on the matter. The petitioner in that case pointed to certain materials, but the United States Supreme Court stated, "We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." [1]

In the instant case petitioners made a motion for an evidentiary hearing regarding their claim that the exclusion of veniremen opposed to capital punishment results in an unrepresentative jury on the issue of guilt and substantially increases the risk of conviction. We denied the motion in December 1967. Petitioners have again requested such a hearing and ask that we reconsider the matter in the light

[1] *Witherspoon* further declared (fn. 18, p. 520), that "in some future case" a defendant convicted by a jury from which the state had excluded only those prospective jurors who stated that they would not even consider returning a death penalty "might still attempt to establish that the jury was less than neutral with respect to *guilt*. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment."

In *Witherspoon* one of the three dissenting justices similarly stated (fn. 1, p. 541), "I would not wholly foreclose the possibility of a showing that certain restrictions on jury membership imposed because of jury participation in penalty determination produce a jury which is not constitutionally constituted for the purpose of determining guilt."

of *Witherspoon*. They state that they have arranged with Louis Harris and Associates to conduct a described study and that the result of this study "is suggestive of the kind of factual inquiry whose product can be presented at an evidentiary hearing." They further state that the Harris study has not yet been finished and that preparation for an evidentiary hearing will require "several more months—at the least." What was stated by the New Jersey Supreme Court in response to a request for the same type of evidentiary hearing is applicable, namely, ". . . we cannot suspend the judicial process until projected studies are made at the behest of a litigant. This is especially true when the studies are of a sociological or psychological nature, for the prospect is remote that such studies will yield views of human behavior of such incontestable, eternal truth that existing constitutional doctrines will have to retreat before them. Such studies hold too little promise to warrant what would amount to an indeterminate stay of the judicial process in a critical area." (*State of New Jersey* v. *Forcella* (July 1968) —— A.2d ——.) It is thus unnecessary to consider at this time various arguments of the Attorney General in support of his position that petitioners are not entitled to an evidentiary hearing.

Penalty Discretion: Standards

Petitioners further contend that Penal Code sections 190 and 190.1 violate the due process and equal protection clauses of the United States Constitution because those sections, allegedly without specifying any standards, impose on the trier of fact the duty of selecting the penalty. It is asserted that the absence of standards prevents a defendant from knowing how to defend himself at the penalty trial, permits the trier of fact to impose the death

penalty for arbitrary reasons, and precludes a meaningful review of the penalty imposed.

Section 190, as enacted in 1872, specified the death penalty as the sole punishment for first degree murder. By the amendments of 1873-1874, the section vested in the trier of fact discretion to fix the penalty at death or life imprisonment, and from that time to the present date no amendments to the section have modified or limited in any way the absolute discretion of the trier of fact to determine which of the two penalties to impose.[2] Section 190.1, as enacted in 1957 and amended in 1959, likewise does not limit that discretion.

This court has held repeatedly that under sections 190 and 190.1 the Legislature has entrusted to the absolute discretion of the trier of fact the awesome decision between

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[2] Section 190 provides: "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1, . . ." (Amendments to the Codes, 1873-1874, p. 457; Stats. 1921, ch. 105, § 1, p. 98; Stats. 1927, ch. 889, § 1, p. 1952; Stats. 1957, ch. 1968, § 1, p. 3509.)

Section 190.1 provides: "The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. . . ."

life imprisonment and death for first degree murder (e.g. *People* v. *Polk*, 63 Cal.2d 443, 454 [cert. den. 384 U.S. 1010]; *People* v. *Hines*, 61 Cal.2d 164, 168-169; *People* v. *Purvis*, 56 Cal.2d 93, 96; *People* v. *Brice*, 49 Cal.2d 434, 437; *People* v. *Green*, 47 Cal.2d 209, 218), and that the law does not prescribe or authorize the court to innovate any rule circumscribing the exercise of that discretion—that the jury need not find ameliorating circumstances to impose life imprisonment, nor need they find aggravating circumstances to impose death (e.g. *People* v. *Hamilton*, 60 Cal.2d 105, 136; *People* v. *Lane*, 56 Cal.2d 773, 786; *People* v. *Green*, *supra*, 47 Cal.2d 209; *People* v. *Friend*, 47 Cal.2d 749, 767). An instruction directing the jury to fix the penalty at death unless they found extenuating circumstances was held contrary to the statute and erroneous in *People* v. *Green*, *supra*, 47 Cal.2d 209, 217, which overruled a line of cases originating with *People* v. *Welch* (1874) 49 Cal. 174, that approved such an instruction.

Although the jury has absolute discretion in determining which penalty to impose, safeguards exist to protect against any possibility of arbitrary action. In disposing of a defendant's motion for a new trial, the trial judge has the duty to review the evidence to determine whether in his independent judgment the weight of the evidence supports the jury's verdict, and if he decides it does not, he has the power to reduce the penalty to life imprisonment. (Pen. Code, §1181, subd. 7; *People* v. *Hill*, 66 Cal.2d 536, 567-568 [cert. den. 389 U.S. 1009]; *People* v. *Love*, *supra*, 6 Cal.2d 720, 727-729; *People* v. *Moore*, 53 Cal.2d 451, 454.) In addition, the Governor has the power to grant a pardon or commutation. (Cal. Const., art. V, §13; Pen. Code, §4800 et seq.) This court, however, has consistently and repeatedly held that it has no power to substitute its judgment

as to choice of penalty for that of the trier of fact. (E.g. *People* v. *Lookadoo*, 66 Cal.2d 307, 327; *People* v. *Mitchell*, 63 Cal.2d 805, 821 [cert. den. 384 U.S. 1007]; *People* v. *Howk*, 56 Cal.2d 687, 699-701; *People* v. *Monk*, 56 Cal.2d 288, 300; *People* v. *Rittger*, 54 Cal.2d 720, 734-735; *People* v. *Cash*, 52 Cal.2d 841, 845; *People* v. *Linden*, 52 Cal.2d 1, 26 [cert. den. 364 U.S. 849]; *People* v. *Green*, *supra*, 47 Cal.2d 209, 235; *People* v. *Harrison*, 41 Cal.2d 216, 219; *People* v. *Dessauer*, 38 Cal.2d 547, 555 [cert. den. 344 U.S. 858]; *People* v. *Thomas*, 37 Cal.2d 74, 77-78; *People* v. *Odle*, 37 Cal.2d 52, 58; *People* v. *Danielly*, 33 Cal.2d 362, 383 [cert. den. 337 U.S. 919]; *People* v. *Tuthill*, 32 Cal.2d 819, 827.)

The constitutionality of sections 190 and 190.1, as construed by this court, has been upheld. Repeated previous attacks upon one or both of the sections on the ground that their failure to provide standards rendered them unconstitutional or impermissibly vague or a violation of due process consistently have been rejected. (E.g. *People* v. *Hill*, *supra*, 66 Cal.2d 536, 568-569 [cert. den. 389 U.S. 993]; *People* v. *Seiterle*, 65 Cal.2d 333, 340 [cert. den. 387 U.S. 912]; *People* v. *Mason*, 54 Cal.2d 164, 169.)[3]

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[3] The suggestion that the previous decisions of this court assumed that constitutional doctrines applicable to statutes regulating conduct did not govern statutes prescribing penalties is devoid of merit. Not only in *Hill*, *Seiterle*, and *Mason*, but in other cases involving various constitutional attacks on penalty statutes we have not assumed constitutional doctrines were inapplicable but rather have held that the statutes complied with the Constitution and have rejected the attacks on their merits. (E.g. *People* v. *Turville*, 51 Cal.2d 620, 638; *In re Watkins*, 64 Cal.2d 866, 869-870.) Nor is reexamination of *Hill*, *Seiterle*, and *Mason* required by the statement in *Witherspoon* that "It should be understood that much more is involved here than a simple determination of sentence." Manifestly at the time of our cited cases we were fully aware of what was there involved.

Appendix B

In other jurisdictions courts have likewise rejected claims that due process or equal protection was violated by statutes vesting in the trier of fact unguided discretion in the choice between the penalties of death and life imprisonment. (*Maxwell* v. *Bishop*, 398 F.2d 138, 148-150; *In re Ernst's Petition*, 294 F.2d 556, 560-561 [cert. den. 368 U.S. 917]; *State* v. *Walters* (Conn.) 138A.2d 786, 792-794 [app. dism. and cert. den. 358 U.S. 46]; *State* v. *Latham* (Kan.) 375 P.2d 788, 796-799 [cert. den. 373 U.S. 919]; *Chatterton* v. *Dutton* (Ga.) 154 S.E.2d 213, 215 [cert. den. 389 U.S. 914]; *State* v. *Forcella, supra,* (N.J.) —— A.2d ——; *State* v. *Johnson* (N.J.) 168 A.2d 1, 10-11 [app. dism. "for want of a substantial federal question," 368 U.S. 145, cert. den. 368 U.S. 933]; see also *Ex Parte Sullivan*, 83 F.2d 796, 798.)

The statutes in *State* v. *Latham, supra,* and *Ex Parte Sullivan, supra,* are similar in form to our sections 190 and 190.1. In the other out-of-state cases the statutes specify that the penalty for first degree murder shall be death unless the jury recommends life imprisonment. It has been suggested that this difference has constitutional significance because such statutes empower the jury to mitigate the death penalty whereas under our statutes the jury selects between two alternative penalties neither of which is given preference by the Legislature (see *People* v. *Green, supra,* 47 Cal.2d 209, 218). In effect, however, both forms confer unguided discretion upon the jury as to the choice of penalties and it would exalt form over substance to conclude that one violates due process and equal protection and the other does not. As we shall see, in one sense both approaches serve to mitigate capital punishment, and both have been widely used throughout the United States (see American Law Institute, Model Penal Code Tentative Draft No. 9 (1959) pp. 121-126; Knowlton, *Problems of Jury*

Discretion in Capital Cases (1953) 101 U.Pa.L.Rev. 1099, 1101-1103).

Vesting in the trier of fact unguided discretion in the choice between penalties for first degree murder has long been characteristic of the laws of the United States and of many states. (See *In re Ernst's Petition, supra,* 294 F.2d 556, 560; see generally Knowlton, *Problems of Jury Discretion in Capital Cases, supra,* 101 U.Pa.L.Rev. 1099, 1101-1103.) The Legislature, by entrusting to the absolute discretion of the jury the decision between life imprisonment and death has indicated its belief that jurors understand the factors that are relevant to such a decision. (*People* v. *Polk, supra,* 63 Cal.2d 443, 451.)

It may be neither practicable nor desirable that any rigid formula control a trier of fact in determining whether to extend mercy by imposing life imprisonment or to deny it by imposing death. (See *In re Ernst's Petition, supra,* 294 F.2d 556, 560-561; *State* v. *Johnson, supra,* 168 A.2d 1, 10-11; Royal Commission on Capital Punishment 1949-1953 Report, pp. 173-174 and 195.) But even if it were practicable and desirable to have such a formula it does not follow that the Legislature's failure to provide one renders the sections unconstitutional.

A statute mitigating capital punishment is not essentially unfair to the wrongdoer for failure to specify standards for the exercise of that discretion. Sections 190 and 190.1, like the Federal Kidnapping Act which was involved in *United States* v. *Jackson,* 390 U.S. 570, 581-582,[4]

[4] *United States* v. *Jackson, supra,* held unconstitutional the death penalty provision of the Federal Kidnaping Act, which permitted imposition of the death penalty only upon defendants who assert their right to be tried by a jury, reasoning that the effect of the provision was to needlessly penalize the assertion of the Fifth Amendment right to plead not guilty and the Sixth Amendment right to demand a jury trial. California Penal Code sections 190 and 190.1 do not contain this constitutional infirmity.

have as an objective the avoidance of "the more drastic alternative of mandatory capital punishment in every case. In this sense, the selective death penalty procedure established by the Federal Kidnapping Act [or California Penal Code sections 190 and 190.1] may be viewed as ameliorating the severity of the more extreme punishment that Congress [or the state Legislature] might have wished to provide."

The discretion conferred upon the penalty jury is similar to that conferred on the trial court to punish certain crimes as either felonies or misdemeanors. Many sections of the Penal Code vest in the trial court discretion to sentence defendants convicted of such crimes to state prison or to jail, without mention of standards for exercise of that discretion. (E.g. Pen. Code, §§17, 476a, 489, 496, 525.) Such sections have been held not to violate due process or equal protection. (*In re Watkins, supra,* 64 Cal.2d 866, 869-870; *In re Rosencrantz,* 211 Cal. 749, 750-751; *People* v. *Widener,* 220 Call.App.2d 826, 830; cf. *Smith* v. *Rhay,* 254 F.2d 306, 308; *Daloai* v. *Rhay,* 252 F.2d 768, 770-771.) *In re Watkins, supra,* at page 870, states, " 'Since every person charged with the offense has the same chance for leniency as well as the same possibility of receiving the maximum sentence, there is nothing discriminatory in the statute.' "

It has been suggested that the similarity between the discretion conferred on a penalty jury to choose between life imprisonment and death and the discretion conferred on a trial court to sentence a defendant to state prison or to jail is only superficial because (1) the trial court, unlike the penalty jury, does not select between two legislatively neutral alternative penalties; (2) the trial court's sentencing discretion is circumscribed by standards in-

herent in the penological regime of rehabilitation, whereas the penalty jury's discretion is not so circumscribed; (3) the decision rendered by the trial court is of less gravity than that rendered by the penalty jury; and (4) the trial court's discretion is not absolute since the defendant may seek appellate review on the ground of abuse of discretion, whereas the penalty jury's discretion is absolute.

The asserted distinctions are not persuasive. In both cases the Legislature has prescribed the punishments available; in both it has authorized a specified body to make a choice within the legally prescribed limits. The fact that a crime punishable as a felony or a misdemeanor is regarded as a felony unless and until the trial court imposes a misdemeanor sentence (Pen. Code, §17; *People* v. *Banks*, 53 Cal.2d 370, 380-383; *People* v. *Finley*, 219 Cal. App.2d 330, 341) does not show that the Legislature prefers a felony sentence to be imposed by the trial court. Although the form of the choice by which the discretion conferred is to be exercised differs, this difference does not warrant contrary conclusions concerning the constitutionality of the respective statutes.

A defendant's potential for rehabilitation is but one of several factors the trial court considers in determining whether to sentence a defendant to jail or to state prison. The trial court also considers matters such as the community's need for protection (see *People* v. *Smith*, 259 A.C.A. 923, 928), and no specific standard controls the exercise of the trial court's discretion. A defendant's potential for rehabilitation is similarly an appropriate factor for the penalty jury to consider in determining which penalty to impose. (See *People* v. *Morse*, 60 Cal.2d 631, 647; see also *People* v. *Polk*, *supra*, 63 Cal.2d 443, 451.)

The trial court's decision may be of less gravity than

that of the penalty jury, but both decisions involve grave consequences to the individuals involved. And finally, although the penalty jury has absolute discretion to determine which penalty to impose, such discretion, as we have seen, is absolute only in the first instance since the trial judge in ruling on a motion for a new trial, has the power to reduce the penalty to life imprisonment if in his independent judgment the weight of the evidence does not support the death penalty.

It should also be noted that *Witherspoon* v. *Illinois*, *supra*, 391 U.S. 510, mentions lack of standards in selecting between death and life imprisonment and gives no intimation that the procedure is therefore unconstitutional.[5]

Reliance by petitioners upon *Giaccio* v. *Pennsylvania*, 382 U.S. 399, is misplaced. As we pointed out in *People* v. *Seiterle*, *supra*, 65 Cal.2d 333, 340 (cert. den. 387 U.S. 912), *Giaccio* "is not contrary to the cited cases [which held §190.1 constitutional]. *Giaccio* held that a statute permitting a jury to assess costs against an acquitted defendant was constitutionally invalid because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory

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[5] *Witherspoon* states (at p. 519), "Guided by neither rule nor standard, 'free to select or reject as it [sees] fit,' a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life and death,[15]" and footnote 15 reads in part "[Illinois] has deliberately 'made . . . the death penalty . . . an optional form of punishment which [the jury remains] free to select or reject as it [sees] fit.' [Citation.] And one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' Trop v. Dulles, 356 U.S. 86, 101. . . ."

imposition of costs. The court expressly stated in *Giaccio* that 'In so holding we intend to cast no doubt whatever on the constitutionality of the settled practice of many states to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits.' (382 U.S. at p. 405, fn. 8.)" (See also *Maxwell* v. *Bishop, supra,* 398 F.2d 138, 149-150; *State* v. *Forcella, supra* (N.J.) —— A.2d ——.)

The instant case differs from *Skinner* v. *Oklahoma,* 316 U.S. 535, cited by petitioners. *Skinner* held that a statutory classification requiring sterilization under specified circumstances of persons convicted of larceny but not those convicted of embezzlement was a violation of equal protection. The court stated in part (at p. 541) "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes the one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." Penal Code sections 190 and 190.1, however, do not contain an unconstitutional classification, and, since under like circumstances every person convicted of first degree murder has the same chance for leniency as well as the same possibility of receiving the maximum sentence, there is nothing discriminatory in the sections.

There is, of course, a presumption in favor of constitutionality, and the invalidity of a legislative act must be clear before it can be declared unconstitutional. (*Eye Dog Foundation* v. *State Board of Guide Dogs for the Blind,* 67 Cal.2d 536, 549; *Patton* v. *La Bree,* 60 Cal.2d 606, 609; *In re Cregler,* 56 Cal.2d 308, 311.)

No authority has been cited holding that statutes like Penal Code sections 190 and 190.1 violate due process

or equal protection. For the reasons set forth above we are satisfied that we should not depart from our previous conclusion in this regard.

No Delegation Of Legislative Power To Jury

It is also asserted that Penal Code sections 190 and 190.1, as presently construed and applied, delegate to the penalty jury a legislative function in a manner that violates the section of the state Constitution providing for separation of powers (art. III, §1). It is argued that the members of the jury have been delegated legislative powers because they must resolve basic policy questions with regard to the type of punishment to be imposed, as opposed to the extent of punishment to be imposed. That delegation is said to be improper because the sections do not contain standards sufficiently certain to preclude arbitrary exercise of that power by the jury, or to insure a reasonable opportunity of securing redress by judicial review if that power is abused. The same contention with regard to a statute similar to ours was rejected by the Supreme Court of Kansas in *State* v. *Latham, supra,* 375 P.2d 788, 798: "The legislative power was exercised when the legislature fixed the punishment for murder in the first degree. The statute does no more than empower a jury, upon a consideration of all the evidence and the court's instructions, to assess the extent of punishment prescribed beforehand in accordance with the heinousness or gravity of the homicide. In performing that duty, the jury in no sense exercises legislative power." Similar contentions with regard to the court's power to impose penal sentences within legislatively fixed limits have likewise been rejected in several noncapital cases. (*People* v. *Pryor,* 17 Cal.App.2d 147, 152; *In re O'Shea,*

11 Cal.App. 568, 572; *State* v. *Logan* (Ariz.) 493 P.2d 279, 280; *People* v. *Reid* (Ill.) 72 N.E.2d 812 [cert. den. 332 U.S. 776].)

Not Cruel Or Unusual Punishment

It is next contended that for various reasons the death penalty for first degree murder constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution and section 6, article I, of the California Constitution.[6]

Numerous cases have rejected claims that the death penalty for first degree murder constitutes cruel and unusual punishment per se. (E.g. *Wilkerson* v. *Utah*, 99 U.S. 130; *People* v. *Thomas*, 65 Cal.2d 698, 708 [cert. den. 389 U.S. 868]; *People* v. *Bashor*, 48 Cal. 2d 763, 765; *People* v. *Lazarus*, 207 Cal. 507, 514; see *Trop* v. *Dulles*, 356 U.S. 86, 99 [plurality opinion]; 21 Am.Jur, 2d pp. 544-545, 553-555; 24B C.J.S., p. 555; 5 Wharton's Criminal Law and Procedure (1957) p. 424; Mosk, *The Eighth Amendment Rediscovered* (1968) Loyola L.A. L.Rev., pp. 20-22; see also *Francis* v. *Resweber*, 329 U.S. 459, 463-464 [plurality opinion].)

Petitioners urge us to reconsider the matter. They argue that the death penalty is cruel and unusual punishment because it "inflicts the loss of life without commensurate justification." They assert that life is a fundamental right, that before the state may restrict a fundamental

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[6] The Eighth Amendment of the United States Constitution prohibits "cruel and unusual punishment." This amendment is, of course, applicable to the states. (*Robinson* v. *California*, 370 U.S. 660.)

Section 6 of article I of the California Constitution provides, ". . . nor shall cruel or unusual punishment be inflicted."

right it must demonstrate a "compelling interest" in so doing, and that to show such an interest the state must establish that (1) the restriction imposed rationally relates to legitimate governmental objectives sought; (2) the benefit to the public far outweighs the impairment of the constitutional right, and (3) no alternative means less subversive of the constitutional right are available. Petitioners assert that the state's compelling interest is the punishment of criminals, that the proper functions of punishment are isolation, rehabilitation and deterrence, and do not include retribution (see *In re Estrada*, 63 Cal.2d 740, 745), and that isolation and rehabilitation can better be achieved by life imprisonment than execution. They offer to establish at an evidentiary hearing that the death penalty is not a more effective deterrent than life imprisonment. Petitioners cite cases applying a compelling interest test in contexts other than the question of the validity of a statute imposing a penalty for a crime. (E.g. *Sherbert* v. *Verner*, 374 U.S. 398, 406; *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 438-444; *Parrish* v. *Civil Service Commission*, 66 Cal.2d 260, 271.)

"The fixing of penalties for crime is a legislative function. What constitutes an adequate penalty is a matter of legislative judgment and discretion and the courts will not interfere therewith unless the penalty prescribed is clearly and manifestly cruel and unusual." (*People* v. *Tanner*, 3 Cal.2d 279, 298; *People* v. *Keller*, 245 Cal.App.2d 711, 714-715.) In *Trop* v. *Dulles*, *supra* (1958) 356 U.S. 86, 99 (plurality opinion), which concluded that denationalization for wartime desertion constituted a cruel and unusual punishment within the meaning of the Eighth Amendment, it was stated, "[L]et us put to one side the death penalty as an index of the

constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

Petitioners further argue that the death penalty is cruel and unusual in that it is imposed without standards and can be imposed regardless of extenuating circumstances. The absence of so-called standards has previously been discussed. It seems clear that the death penalty, which has been repeatedly upheld against claims that it constitutes cruel and unusual punishment per se,[1] does not become cruel or unusual as a result of the Legislature's vesting in the trier of fact discretion to extend mercy to a convicted first degree murderer.

In contending that the death penalty is unconstitutional, amici point to the statement in *Trop* v. *Dulles*, *supra*, 356 U.S. 86, 101, that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." An amicus curiae brief also contends that the death penalty violates the Eighth Amendment because it "drives men mad and to suicide." In support of these contentions amici point to testimony in *People* v. *Thornton*, Los Angeles Superior Court No. 328445, and to various documents. The matters pointed to do not disclose the percentage of prisoners on death row who during any recent period, as a result of being under the death sentence, attempted suicide or became insane. In any event, in a day when the death penalty "is still widely accepted, it cannot be said to violate the

[1] See authorities cited on page 25.

constitutional concept of cruelty." (See *Trop* v. *Dulles*, *supra*, 356 U.S. 86, 99 [plurality opinion].)

The fact that under Penal Code section 3604 the death penalty is inflicted by the administration of "a lethal gas" does not render the punishment cruel or unusual. (*People* v. *Daugherty*, 40 Cal.2d 876, 894 [cert. den. 346 U.S. 827; reh. den. 346 U.S. 880].)

A further contention is made that the "anguish of the 1,000 day wait on death row and the attendant deterioration of personality" renders the death penalty cruel and unusual. To support the assertion of such anguish and deterioration extracts from books and testimony in *People* v. *Thornton*, *supra*, Los Angeles Superior Court No. 328445, are set forth in an amicus brief. A similar contention was rejected in *People* v. *Chessman*, 52 Cal.2d 467, 498-499 (cert. den. 361 U.S. 925; pet. for reh. den. 361 U.S. 941). There the defendant was detained pending execution of sentence of death for more than 11 years during which period various matters of which he complained were litigated. He contended that such confinement constituted cruel and unusual punishment. We recognized that mental suffering undoubtedly attended his detention, indicated that there had not been unreasonable delay by California in the proceedings, and concluded that unconstitutionally cruel or unusual punishment had not been imposed.

Basic Due Process Not Violated

Amici next contend that, independently of the constitutional prohibition against cruel and unusual punishment, life is a fundamental right protected from state interference absent a compelling state interest, and they argue at length that the state cannot establish the existence of such an interest. They also suggest that under tests other

than that of a compelling state interest the death penalty violates due process. However, the fixing of penalties for a crime is a legislative function (*People* v. *Wade*, 53 Cal. 2d 322, 336; *People* v. *Tanner*, *supra*, 3 Cal.2d 279, 298; *People* v. *Quilon*, 245 Cal.App.2d 624, 629; *People* v. *Olson*, 173 Cal.App.2d 535, 536-537), and we will not nullify the legislative judgment as to the appropriate penalties for the heinous crime of first degree murder. It is for the Legislature and not this court to decide whether it is sound public policy to empower the imposing of the death penalty. (See *Robinson* v. *United States*, 324 U.S. 282, 286.)

Counsel For Indigent Defendants

Petitioners further contend that the due process and equal protection clauses of the United States Constitution confer upon indigent defendants in capital cases the right to appointed counsel throughout the period between the termination of their state appeals and their execution. They argue that the state must appoint counsel for such defendants to represent them with respect to appeals or petitions for certiorari to the United States Supreme Court, habeas corpus petitions to federal courts, and applications for executive clemency, and to institute and represent such defendants at sanity hearings conducted under Penal Code sections 3700 et seq.

Petitioners had counsel on appeal (*People* v. *Saterfield*, *supra*, 65 Cal.2d 752; *People* v. *Anderson*, *supra*, 64 Cal. 2d 633), and no claim is made that they were denied their right to counsel at any stage prior thereto. Their argument is directed to the post-state-appeal period, one which, of course, may be of many years duration as a result of a prisoner's litigating and relitigating his claims in various courts.

It is undisputed that petitions for certiorari were filed by petitioners in propria persona; that petitioners were

then, and are now, indigent; that Saterfield has a pending application for executive clemency; that, although Saterfield has counsel in the instant proceeding and a related one in a federal court, he is otherwise unrepresented by counsel; and that Anderson is now represented for all purposes by an attorney. This court has determined that the appointment of counsel to represent indigent defendants in capital cases in all proceedings between the termination of their state appeals and their execution, such as petitions for certiorari, habeas corpus petitions to state and federal courts, applications for executive clemency and the conduct of sanity hearings where indicated, will best serve the cause of justice, the interests of the defendants and this court. Counsel will be appointed routinely in the future in all such cases as a matter of policy.[1]

In view of this policy no purpose would be served by our giving further consideration to petitioners' claims for the services of counsel as a matter of right. Such services will be furnished these petitioners in keeping with such policy in any such proceedings in which they are not now represented by counsel.

Conclusion

Other contentions, exhaustively briefed and argued in the extensive and carefully prepared briefs of counsel and amici, are not relevant to the issues presented in these

[1] It should also be noted that under an amendment to Penal Code section 1239, effective the 61st day after the adjournment of the 1968 Regular Session, indigent capital defendants will have a statutory right to appointed counsel in certain proceedings. The amendment provides: "If the defendant [in a capital case] is unable to afford the services of counsel, the Supreme Court shall appoint counsel to represent him in any appeal to the Supreme Court, or any appeal or other review in the Supreme Court of the United States."

cases, or lack merit, or concern matters that may not arise upon the penalty retrials.

We denied petitioners' request for an evidentiary hearing relatig to their various contentions in December 1967. They have again requested such a hearing. That request is likewise denied.

Sections 190 and 190.1 were the result of an exercise by our Legislature of power vested in it by the Constitution and an exercise by the Governor of his power in approving the bills and making them "the law." To sustain the sections is to respect the actions of the two branches of our government directly responsive to the will of the people and empowered under the Constitution to determine the wisdom of legislation. It is, of course, our duty to strike down unconstitutional statutes, but we are not entrusted with their wisdom. The constitutionality of sections 190 and 190.1 has previously been upheld, and in our opinion properly so. Petitioners were found guilty of the heinous crime of first degree murder, and their judgments were affirmed.

Under the compulsion of *Witherspoon* v. *Illinois, supra,* 391 U.S. 510, the writs are granted as to the penalty trials. The remittiturs issued in Crim. 10126, *People* v. *Saterfield,* and Crim. 9317, *People* v. *Anderson,* are recalled and the judgments imposing the death penalty are reversed insofar as they relate to the penalty. In all other respects they are affirmed: Saterfield is remanded to the custody of the Orange County Superior Court and Anderson to the custody of the San Diego County Superior Court for new trials on the issue of penalty.

BURKE, J.

WE CONCUR:

MOSK, J.

SULLIVAN, J.

Appendix B

[*Concurring Opinion by Mosk, J.*]

I concur in the opinion of Justice Burke.

In my years as Attorney General of California (1959-1964), I frequently repeated a personal belief in the social invalidity of the death penalty, notably in testimony before California legislative committees in March 1959, July 1960, and April 1963.

Naturally, therefore, I am tempted by the invitation of petitioners to join in judicially terminating this anachronistic penalty. However, to yield to my predilections would be to act wilfully "in the sense of enforcing individual views instead of speaking humbly as the voice of law by which society presumably consents to be ruled. . . ." (Frankfurter, *The* Supreme Court in the Mirror of the Justices (1957) 105 U.Pa. L.Rev. 781, 794.)

As a judge, I am bound to the law as I find it to be and not as I might fervently wish it to be. I conclude that Justice Burke has properly stated the current law of California and of every other American jurisdiction that has considered the problem.

Mosk, J.

[*Concurring and Dissenting Opinion by Tobriner, J.*]

I concur with the opinion of Justice Burke insofar as it holds that Witherspoon v. Illinois (1968) 391 U.S. 510, requires that we set aside the penalty previously imposed in the two cases now before us. I agree that indigent defendants in capital cases should be entitled to appointed counsel throughout the period between the termination of their state appeals and their execution. I submit, however, that sections 190 and 190.1 of the Penal Code of California violate the Fourteenth Amendment of the Constitution of

the United States because they provide no standards or tests whatsoever to enable judge or jury to decide why one convicted capital defendant should die and another should live. The California penalty trial leaves this vital decision to the unguided whim and caprice of the trier of fact; this irrational process, the antithesis of due process, has no place in the consitutional structure of American law.

The present petitions for habeas corpus require this court for the first time to conduct a full-scale inquiry into the constitutionality of the administration of the death penalty in California. Although the Legislature bears the responsibility for fixing the penalty for a given crime, we cannot avoid our own obligation to decide whether the present process of decreeing the penalty of death conflicts with the Constitution. The hard task of reaching such a decision must be a judicial one; we cannot evade it by saying it should be discharged by some other branch of government.

Two recent decisions of the United States Supreme Court, United States v. Jackson (1968) 390 U.S. 570, and especially Witherspoon v. Illinois, supra, 391 U.S. 510, compel us to reexamine the contention that the lack of prescribed standards in the administration of the death penalty takes the life of the capital defendant without the protection of due process and the equal protection of the laws. Our prior decisions have assumed that constitutional doctrines applicable to statutes regulating conduct and to the process of determining guilt did not govern statutes prescribing penalties; our cases predicated a constitutionally significant difference between these two types of statutes. We struck down as unconstitutional the regulation of conduct by statutes

that lacked ascertainable standards or that permitted arbitrary classification (see, e.g., In re Newbern (1960) 53 Cal.2d 786; People v. McCaughan (1957) 49 Cal.2d 409; Perez v. Sharp (1948) 32 Cal.2d 711) but we sustained the imposition of the penalty of death by statutes subject to such constitutional infirmity.

In *Jackson* and *Witherspoon* the United States Supreme Court for the first time adjudged the constitutionality of the procedure for imposition of the death penalty in light of constitutional doctrines traditionally applied to statutes proscribing conduct or involving the guilt-determination process. *Jackson* and *Witherspoon* therefore require us to reject the distinction implicit in our prior decisions between the death penalty procedure, on the one hand, and the guilt-determination process and statutes regulating conduct, on the other hand. Moreover, as we shall explain, *Witherspoon* makes clear that even if some forms of sentencing discretion differ in a constitutionally significant manner from guilt-determination processes, the imposition of the death penalty cannot be treated as simply another form of sentencing when it involves constitutional rights basic to procedural fairness. We must therefore consider afresh the constitutionality of the administration of the death penalty in California in light of the traditional line of cases holding that the due process and equal protection clauses of the Fourteenth Amendment protect against loss of a fundamental right—here, life itself—by an arbitrary power of decision.

In *Jackson*, the United States Supreme Court invoked the "overbreadth" doctrine,[1] traditionally a First Amend-

[1] The Supreme Court has traditionally applied the "overbreadth" doctrine in cases involving regulation of conduct protected by the

ment doctrine which the court applied to statutes regulating conduct, to nullify the penalty provision of the

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First Amendment. The requirement that statutes be not "overly broad" in their application, so that First Amendment liberties are not unnecessarily infringed, is typically stated in the following terms: "A statute touching those protected rights must be 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State.' *Cantwell* v. *Connecticut*, 310 U.S. 296, 311. Legitimate legislative goals 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton* v. *Tucker*, 364 U.S. 479, 488." (*Elfbrandt* v. *Russell* (1966), 384 U.S. 11, 18.)

The "overbreadth" doctrine, like the "void-for-vagueness" doctrine (see discussion of *Giaccio, infra*), prohibits loosely drawn statutes. The purpose of each differs, however. The former serves to prevent the state from needlessly interfering with protected rights when it can achieve its legitimate legislative purposes by a statute with a narrower application. The void-for-vagueness doctrine, on the other hand, seeks to prevent deprivation of fundamental rights by the imposition of a statute whose terms make its application uncertain. Both doctrines are often applicable, however, to the same statute. (See, e.g., Baggett v. Bullitt (1964), 377 U.S. 360, 366-373; NAACP v. Button (1963), 371 U.S. 415, 432-438.)

The Supreme Court relied upon two First Amendment cases applying the "overbreadth" doctrine in *Jackson:* Shelton v. Tucker (1960), 364 U.S. 479, and United States v. Robel (1967), 389 U.S. 258. *Shelton* held unconstitutional a state statute requiring every teacher to file annually an affidavit listing every organization to which he had belonged or regularly contributed during the preceding five years. Recognizing the propriety of the underlying state purpose, *Shelton* held only that the purpose could be achieved by a more narrowly drawn statute which would infringe less upon First Amendment rights.

Robel struck down a section of the 1950 Subversive Activities Control Act which provided that when a Communist-action organization is under a final order to register, it shall be unlawful for any member of the organization "to engage in any employment in any defense facility." (50 U.S.C., § 784(a)(1)(D).) The Supreme Court reasoned that the legitimate congressional purpose of "national defense" could be achieved by means less destructive of First Amendment rights.

Federal Kidnaping Act (18 U.S.C. §1201(a).)[1] The Supreme Court reasoned that the statute, in providing in effect that only a jury, and not a judge, could impose the death penalty, "needlessly *encourages*" waivers of jury trials and guilty pleas. (390 U.S. at p. 583.) The Supreme Court concluded that since Congress could accomplish its alleged "mitigating" purpose[2] in a manner more consonant with the constitutional rights of the capital defendant, the statutory procedure for imposing the death penalty violated the Constitution.

Although *Jackson* involved a federal statute and explicitly dealt with a penalty procedure which impaired

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[1] The statute provides that the convicted defendant "'shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.' This statute thus creates an offense punishable by death 'if the verdict of the jury shall so recommend.' The statute sets forth no procedure for imposing the death penalty upon a defendant who waives the right to jury trial or upon one who pleads guilty." (United States v. Jackson, supra, 390 U.S. 570, 571.)

Admittedly, our death penalty procedure does not involve this defect (as pointed out in Justice Burke's opinion, page 18, footnote 4). The importance of *Jackson* is not that the holding applies here, but that the rationale used by the court—a rationale which heretofore has been applied only in cases involving conduct as opposed to penalties—requires us to reconsider our prior decisions which necessarily assume that the constitutionality of the death penalty procedure is not to be tested by the same constitutional standards governing guilt-determining procedures and statutes which prescribe criminal conduct.

[2] "The Government suggests that, because the Act thus operates 'to mitigate the severity of punishment,' it is irrelevant that it 'may have the incidental effect of inducing defendants not to contest in full measure.' We cannot agree." (United States v. Jackson, supra, 390 U.S. 570, 582.)

the right to a jury trial on the issue of guilt,[4] the rationale of *Jackson* bears upon the present issue for two major reasons. First, as pointed out above, *Jackson* rested on the constitutional doctrine of overbreadth, which has traditionally been applied only to statutes which regulate conduct. Indeed, the Supreme Court has traditionally invoked this doctrine to protect First Amendment rights as opposed to the rights of a criminal defendant encompassed in the Fourth, Fifth, Sixth, and Fourteenth Amendments. The two cases cited in *Jackson* to support the proposition that the death penalty cannot be constitutionally administered in a manner which "needlessly chill[s] the exercise of basic constitutional rights" (390 U.S. at p. 582), United States v. Robel, supra 389 U.S. 258, and Shelton v. Tucker, supra 364 U.S. 479 (see fn. 1, supra), both involved the extent to which, respectively, Congress and a state could, consistently with the First Amendment, prohibit or require certain conduct as a condition of public employment. *Jackson*, on the other hand, like the present case, involves a statute prescribing a procedure for imposing the death penalty which was attacked on the ground that such procedure unduly infringed the rights of a criminal defendant.

Secondly, *Jackson* expressly rejected the argument that the procedure for the imposition of the death penalty escaped constitutional attack on the ground that the statutory scheme for an alternative penalty of life imprisonment "operates 'to mitigate the severity of [capital] punishment.'" (390 U.S. at p. 582.) In response to the

[4] Cf. Duncan v. Louisiana (1968), 391 U.S. 145, holding that the due process clause of the Fourteenth Amendment "incorporates" the Sixth Amendment right to a trial by jury in state criminal cases.

government's contention that the procedure should be upheld because Congress thereby dispensed mercy through the jury by providing an alternative penalty to death for capital offenders, the Supreme Court stated: "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. Cf. *United States* v. *Robel*, 389 U.S. 258; *Shelton* v. *Tucker*, 364 U.S. 479, 488-489. . . . The Congress can of course mitigate the severity of capital punishment. . . . [But] whatever the power of Congress to impose a death penalty for violation of the Federal Kidnaping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right." (390 U.S. at pp. 582-583.)

Jackson's explicit rejection of the government's attempt to justify the death penalty procedure prescribed by the Federal Kidnaping Act thus exposes the fallacy of the statement in Justice Burke's opinion that "[a] statute *mitigating capital punishment* is not essentially unfair to the wrongdoer for failure to specify standards for the exercise of that discretion." (Italics added.) (Ditto opn., pp. 17-18.) Of course, sections 190 and 190.1 may, like the Federal Kidnaping Act, "have as an objective the avoidance of 'the more drastic alternative of mandatory capital punishment in every case. . . .'" (Ditto opn., p. 18.) But to infer that the procedure prescribed by sections 190 and 190.1 may withstand any constitutional scrutiny because they "'may be viewed as ameliorating the severity of the more extreme punishment that Congress [or the state Legislature] might have wished to provide'" rests on a basic misunderstanding of the *Jackson* decision.

Appendix B

The statement from *Jackson* quoted by the majority[5] must be read in light of the immediately succeeding paragraph in which the Supreme Court states: "The Government suggests that, because the Act thus operates 'to mitigate the severity of punishment,' it is irrelevant that it 'may have the incidental effect of inducing defendants not to contest in full measure.' *We cannot agree. Whatever might be said of Congress'* [or in this case the state Legislature's] *objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights.* . . . The Congress [or the state Legislature] can of course mitigate the severity of capital punishment. . . . But that goal can be achieved without penalizing those defendants who plead not guilty and demand jury trial [i.e., without a procedure impairing fundamental constitutional rights] . . . [I]t is clear that the selective death penalty provision of the Federal Kidnaping Act cannot be justified by its ostensible purpose." (Italics added.) (390 U.S. at p. 582.)

Jackson thus teaches that irrespective of the propriety of the death penalty itself or the provision of an alternative penalty to "mitigate the severity of capital punishment," we must examine the *procedure* for imposition of the penalty. We must determine whether that procedure deprives capital defendants of fundamental rights inherent in the administration of criminal justice.

Witherspoon, even more than *Jackson*, makes clear that death penalty procedures must comply with basic strictures

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[5] The death penalty procedure prescribed by the Federal Kidnaping Act "avoids the more drastic alternative of mandatory capital punishment in every case. In this sense, the selective death penalty procedure established by the Federal Kidnaping Act may be viewed as ameliorating the severity of the more extreme punishment that Congress might have wished to provide." (390 U.S. at pp. 581-582; ditto opn., p. 18.)

of the Fourteenth Amendment. *Witherspoon's* holding that the penalty jury must be *composed* in a manner consonant with the due process clause requires that we consider whether the penalty jury *functions* in a manner consonant with due process.

The Supreme Court in *Witherspoon* stated: "Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a *tribunal so selected.*

"Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without *due process of law.*" (Italics added; fns. omitted.) (391 U.S. at pp. 521-523.)

In determining whether a death sentence imposed by a tribunal that functions without prescribed standards deprives the capital defendant "of his life without due process of law," we must heed the Supreme Court's explanation in *Witherspoon* of the unique function that such a tribunal performs.

"It should be understood that much more is involved here than a simple determination of sentence. For the State of Illinois [as does the State of California under sections 190 and 190.1 of the Penal Code] empowered the jury in this case to answer 'yes' or 'no' to the question whether this defendant was fit to live. To be sure, such a determination is different in kind from a finding that the

defendant committed a specified criminal offense. Insofar as a determination that a man should be put to death might require 'that there be taken into account the circumstances of the offense together with the character and propensities of the offender,' *Pennsylvania* v. *Ashe*, 302 U.S. 51, 55, for example, it may be appropriate that certain rules of evidence with respect to penalty should differ from the corresponding evidentiary rules with respect to guilt. See, *e.g.*, *Williams* v. *New York*, 337 U.S. 241. *But this does not mean that basic requirements of procedural fairness can be ignored simply because the determination involved in this case differs in some respects from the traditional assessment of whether the defendant engaged in a proscribed course of conduct.*" (Italics added.) (391 U.S. at p. 521, fn. 20.)

Witherspoon therefore squarely stands for the proposition that the requirements of the Fourteenth Amendment —those that go to the very fairness and integrity of the penalty-determining process—apply to the procedure pursuant to which the state, be it by judge or jury, takes the life of a capital offender. *Witherspoon* holds that the exclusion of veniremen for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction" violates the "basic requirements of procedural fairness" demanded by the Fourteenth Amendment. Similarly, we must now recognize that a tribunal endowed with unbridled discretion to determine whether a convicted capital defendant shall live or die cannot constitutionally administer the death penalty.

Although the discretionary imposition of the death penalty has long been practiced, no length of uncritical history or mindless tradition may sanction a procedure when "the

constitutionality of the course pursued has . . . been made clear." (Erie R. Co. v. Tompkins (1938) 304 U.S. 64, 77-78; see also, Malloy v. Hogan (1964) 378 U.S. 1, 5; Brown v. Board of Education (1954) 347 U.S. 483, 492-495; Perez v. Sharp, supra, 32 Cal.2d 711, 727.) Chief Justice Warren has said: "when society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. . . . The methods we employ in the enforcement of our criminal laws have aptly been called the measures by which the quality of our civilization may be judged." (Coppedge v. United States (1962) 369 U.S. 438, 449; Douglas v. California (1963) 372 U.S. 353, 357 fn. 2.)

The long span of guideless imposition of the death penalty is no justification for it. If there has been error, its repetition here cannot condone it. The longevity of an erroneous constitutional interpretation is no ground for its preservation.

We begin by reviewing the nature of the procedure under which convicted capital defendants are condemned to death or permitted to live.

I. *Sections 190 and 190.1 of the Penal Code confer absolute discretion on the trier of fact and thereby require the trier of fact to perform a sui generis function which subjects the convicted capital defendant to a power of arbitrary decision.*

Section 190 of the Penal Code provides that "every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court o jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1." Section 190 does not articulate any purpose or prescribe any standards to guide the trier of fact

in its determination of the penalty. Section 190.1 provides that at the penalty trial, "evidence may be presented . . . of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented."

Section 190.1 does not explain which circumstances or background facts should be considered as aggravating and which as mitigating, nor the extent of aggravation or mitigation necessary, for the imposition or withholding of the ultimate penalty. Indeed, we have previously held that the section does not require the jury to give any effect at all to evidence of either aggravating or mitigating circumstances. "The jury does not have to find ameliorating circumstances to impose life imprisonment, nor need it find aggravation to impose the death penalty. The choice between the two rests in the absolute discretion of the jury." (People v. Hamilton (1963) 60 Cal.2d 105, 136; see also People v. Lane (1961) 56 Cal.2d 773, 786.)

Pursuant to these rulings the jury is currently instructed that "it is not essential to your decision that you find mitigating circumstances on the one hand or evidence in aggravation of the offense on the other. . . . Notwithstanding facts, if any, proved in mitigation or aggravation, in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience and absolute discretion. . . . Beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience and absolute discretion of the

jury." (CALJIC (1967 Cumulative Pocket Part) No. 306.1, at p. 128.)

Although the Legislature, in establishing the alternative punishments of death and life imprisonment for first degree murder, must have considered that some capital offenders deserved the ultimate penalty while others should be sentenced to life imprisonment, it did not prescribe any standards to guide the trier of fact in making that critical classification.[1] Thus in past decisions we have construed sections 190 and 190.1 to vest in the trier of fact an "absolute" discretion to determine whether the particular convicted capital defendant should properly be punished by death or life imprisonment. (E.g., People v. Hines (1964) 61 Cal.2d 164, 168-169; People v. Mason (1960) 54 Cal.2d 164, 169; People v. Green (1956) 47 Cal.2d 209, 232; Comment, *The California Penalty Trial* (1964) 52 Cal.L.Rev. 386, 389.)

The decisions applying sections 190 and 190.1 describe the "absolute" nature of the discretion presently vested in the trier of fact during the penalty trial. That discretion is not only unguided and unlimited, its exercise is not even subject to review on the question of abuse. (People v. Odle (1951) 37 Cal.2d 52, 57-59; see also People v. Ortega (1953) 41 Cal.2d 621, 622; People v. Harrison (1953) 41 Cal.2d 216, 219; People v. Thomas (1951) 37 Cal.2d 74, 78; People v. Danielly (1949) 33 Cal.2d 362, 383; People v. Tuthill (1948) 32 Cal.2d 819, 827.)

This absolute discretion imposes on the trier of fact an "onerous task" (People v. Friend (1957) 47 Cal.2d 749,

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[1] Comment, *Scope of Appellate Review of Sentences in Capital Cases* (1960), 108 U.Pa.L.Rev. 434, 444; see generally, Knowlton, *Problems of Jury Discretion in Capital Cases* (1953), 101 U.Pa. L.Rev. 1099.

765) which is totally unlike its normal duties. "The jury's task assumes formidable proportions because it transcends the usual function of finding whether or not certain events occurred and certain consequences resulted from them. The jury in this instance performs no such circumscribed task; it must in each particular case, depending wholly on the kind of defendant and nature of facts before it, decide the issue of life or death. In reaching its crucial decision, although Penal Code section 190.1 states it may consider 'facts in aggravation or mitigation of the penalty,' the jury had no guidelines, no standards, no criteria." (People v. Morse (1964) 60 Cal.2d 631, 643.) "In all other situations than the penalty trial the jury deliberates under the court's instructions and reaches its verdict within the area delineated by the judge. . . . In all other situations than the penalty trial the evidence must be narrowed down to the point at issue; . . ." (People v. Hines, supra, 61 Cal.2d 164, 168-169.)

As a result of this vesting of "absolute" discretion in the trier of fact and the consequent destruction of the procedural safeguard of review, the penalty jury "may conceivably rest the death penalty upon any piece of introduced data [or upon no evidence whatsoever]. The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded 12 times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner." (People v. Hines, supra, 61 Cal.2d at p. 169.)

We shall now explain that the entire fate of an individual human being—the basic question whether he shall live or die—cannot constitutionally be subjected to an unguided and unlimited power of arbitrary decision.

Appendix B

II. ***Imposition of the death penalty in the absence of any prescribed standards deprives the capital defendant sentenced to death of his life without due process of law in violation of the Fourteenth Amendment.***

Nothing could be more basic to the due process clause or to the requirement of procedural fairness (see Witherspoon v. Illinois, supra, 391 U.S. 510, 251, fn. 20) than that a person not suffer the arbitrary deprivation of his life or liberty. The constitutional imperative that laws infringing upon life and liberty be framed in terms of reasonably ascertainable standards is central to our administration of criminal justice. The absence of any standards to circumscribe the trier of fact's discretion under sections 190 and 190.1 of the Penal Code to determine whether a convicted capital defendant shall suffer death or life imprisonment therefore deprives the capital defendant condemned to death of his life without due process of law.

"The requirement of a reasonable degree of certainty in legislation, especially in the criminal law, is a well established element of the guarantee of due process of law." (In re Newbern, supra, 53 Cal.2d 786, 792; Winters v. New York (1948) 333 U.S. 507, 509-510, 515.) The constitutional requirement for certainty in the criminal law serves to protect two basic sets of rights deemed fundamental to the administration of criminal justice. The first is crystallized in the constitutional concept of "notice";[1]

[1] Conviction under a statute which fails "to give fair notice of what acts will be punished . . . violates an accused's rights under procedural due process . . ." (Winters v. New York, supra, 333 U.S. 507, 509-510.) "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon

the second in the demand for procedural safeguards and an opportunity for meaningful review.[8]

A criminal law which is not framed in terms of sufficiently ascertainable standards violates the due process clause in the first instance because it fails to give adequate warning of its own proscription. (Winters v. New York, supra, 333 U.S. 507, 509-510, 515.) Correlatively, in order to protect the accused's right to "a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial," he cannot constitutionally be convicted without being "advised of the charges against him." (In re Hess (1955) 45 Cal.2d 171, 175; Cole v. Arkansas (1948) 333 U.S. 196, 201.) Thus, in Powell v. Alabama (1932) 287 U.S. 45, 68, the Supreme Court found that "it never has been doubted by this court, or any other so far as we know, that notice and hearing

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civil sanction for enforcement. . . . There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment." (*Id.* at p. 515.)

"'It is the duty of the lawmaking body in framing laws to express its intent in clear and plain language to the end that the people upon whom it is designed to operate may be able to understand the legislative will.' [Citations.]" (Perez v. Sharp, supra, 32 Cal.2d 711, 728.)

[8] Although the due process clause does not require a state to provide an appeal from a criminal conviction, nevertheless, when the state does provide such an appeal it cannot sanction procedures which render that appeal meaningless or deprive one class of convicted defendants of the opportunity to secure redress for an incorrect application of the law to them. (Griffin v. Illinois (1956), 351 U.S. 12, 18; Frank v. Mangum (1915), 237 U.S. 309, 327.)

Conviction under a procedure which prevented "an appellate court [from reviewing] the facts and law of a case and intelligently decid[ing] whether the findings of the lower court are supported by evidence . . . would be a denial of due process." (Garner v. Louisiana (1961), 368 U.S. 157, 173.)

are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. . . . In *Holden* v. *Hardy* [(1898)] 169 U.S. 366, 389 [for example] the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' . . . Citations to the same effect might be indefinitely multiplied. . . ."

Secondly, a criminal law lacking a sufficiently ascertainable meaning precludes administration pursuant to constitutionally required procedural safeguards. The lack of ascertainable standards denies the accused a meaningful defense and prevents judicial control and review of the relevancy and sufficiency of the evidence to establish a violation of the law. (Cf. Garner v. Louisiana, supra, 368 U.S. 157, 163-164; Thompson v. Louisville (1960) 362 U.S. 199, 206.) "The objectionable quality of vagueness [in criminal statutes affecting fundamental rights depends] upon the danger of tolerating . . . the existence of a penal statute susceptible of sweeping and improper application." (NAACP v. Button, supra, 371 U.S. 415, 432-433.) Since an accused faced with a charge of violation of such a law can neither adequately prepare a defense to that charge nor protect his rights by seeking judicial review on the ground that the law was incorrectly or arbitrarily applied to him, "'it is a fundamental rule that no citizen should be deprived of his liberty [or his life pursuant to] a law which is uncertain and ambiguous.' [Citations.]" (Perez v. Sharp, supra, 32 Cal.2d 711, 728; see also, In re Oliver

(1948) 333 U.S. 257, 273, 278; Chambers v. Florida (1940) 309 U.S. 227, 236-237.)[9]

Sections 190 and 190.1 of the Penal Code contain both vices of unconstitutionally vague laws which the due process clause prohibits. First, although the offenses for which a person may suffer the death penalty are clearly prescribed, the circumstances under which a person may receive that penalty rather than life imprisonment remain totally unclear. We must assume that in establishing the alternative punishments of death and life imprisonment rather than setting down one mandatory punishment, the Legislature concluded that not all capital offenders should be punished by the extreme penalty. "The very provision of alternatives presupposes a rational means of distinguishing between those alternatives." (Comment. *Scope of Appellate Review of Sentences in Capital Cases,* supra, 108 U.Pa.L.Rev. 434, 444.) Yet the current administration of the death penalty, by failing to provide criteria suffi-

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[9] "[D]ue process requires the adjudication of an individual's rights and duties to be governed by rules of sufficient objectivity to guard against an arbitrary or *ad hominem* result. It follows that such rules, when embodied in a statute, must be definite enough to enable the judge to make rulings of law and charges to the jury which are so closely referable to the statute as to assure consistency of application.

"Due process requires, in addition, that the rules be sufficiently definite to guide the lawyer in contesting their applicability to his client. Without this latter requirement, the right to a hearing would be of little value, because there would be no adequate standards toward which arguments and evidence could be directed. Both of these requirements would seem to be satisfied by the same degree of definiteness; a statute which is sufficiently definite to guide the judge should also be sufficiently definite to guide the lawyer in litigation, because there the function of each is the same —to test application of rules to particular situations." (Note, *Due Process Requirements of Definiteness in Statutes* (1948), 62 Harv. L.Rev. 77-78.)

ciently ascertainable to guide courts and juries in making that distinction, prevents a convicted capital defendant from knowing how to show that he falls within the class of capital offenders for whom the law contemplates the lesser penalty of life imprisonment.

Secondly, and more crucially here, the complete absence of standards in the administration of the death penalty deprives the convicted capital defendant of any way to protect himself against an arbitrary imposition of the death penalty. Since no limitations bound the exercise of the discretion of the trier of fact, the defendant can neither challenge the evidence introduced during the penalty trial on the ground of insufficiency nor seek review on the ground of the erroneous application of the death penalty to him. The epitome of the vice of absence of procedural safeguards inherent in vague and standardless statutes thus permeates the administration of the death penalty: the defendant sentenced to death cannot even show that an ad hoc group of 12 jurors or a judge exercising absolute power over his life abused this discretion. Sections 190 and 190.1 thus deny due process of law because they provide no standards by which an abuse of discretion by the trier of fact can be curbed or even subjected to review. The power of the trier of fact to decree the death sentence is as broad and arbitrary as it is absolute and untouchable.

The contention in Justice Burke's opinion that the trial judge's duty to redetermine the issue of penalty on the motion for a new trial by a capital defendant sentenced to death constitutes a "safeguard . . . against any possibility of arbitrary action" (ditto opn., p. 13) ignores the fact that the judge suffers the same lack of standards as does the jury. Since there are no criteria according to which the judge must decide the propriety of the jury's

imposition of the death penalty, the capital defendant cannot know how to argue either to the trial judge that the jury has improperly applied the death penalty in his case, or to the reviewing court that the trial judge has improperly failed to reduce the penalty decreed by the jury. Far from constituting a "safeguard," the trial judge's standardless discretion to accept or reject the jury's imposition of the death penalty subjects the defendant to a two-level power of arbitrary decision.[10]

We shall now point out that the United States Supreme Court has specifically applied the due process prohibition of vague and standardless statutes to the fixing of punishment and sanctions. Thus the "void-for-vagueness" doctrine (see generally, Note, *The Void for Vagueness Doctrine in the Supreme Court* (1960) 109 U.Pa. L.Rev. 67) cannot be limited to that portion of the criminal law which regulates and proscribes conduct. It applies equally to that part of the law which defines punishments for those who have

[10] The similar suggestion in Justice Burke's opinion that the Governor's clemency power constitutes a "safeguard" against the possibility of an arbitrary imposition of the death penalty (ditto opn., p. 14) likewise rests on a misunderstanding of the constitutional prohibition of laws authorizing arbitrary deprivations of fundamental rights. First, in the absence of any standards, the Governor, as well as an appellate court, cannot determine the basis, and therefore the propriety, of the trier of fact's imposition of the death penalty. Secondly, and more importantly, the clemency power is an extraordinary authority which operates outside the judicial system. (Symposium, Evolving Post-Conviction Procedures, *Executive Clemency in Capital Cases* (1964), 39 N.Y.U. L.Rev. 136, 177-178; Editorial, *Executive Clemency* (1967), 55 Cal.L.Rev. 412, 413-414.) The Governor exercises his power, not to make legal corrections within the judicial administration of the criminal law, but to alter the outcome of the judicial process on the basis of extra-legal considerations. The very character of the clemency power presupposes that the death penalty has been constitutionally applied to the condemned man.

been accused or convicted of engaging in criminal conduct. (Cf. Witherspoon v. Illinois, supra, 391 U.S. 510, 521, fn. 20.)

In Giaccio v. Pennsylvania (1966) 382 U.S. 399, the Supreme Court held that a standardless statute which authorized the jury to assess costs against acquitted defendants, and which imposed a threat of imprisonment for nonpayment of the costs, violated the due process clause of the Fourteenth Amendment. The following reasoning in *Giaccio* applies to the present administration of the death penalty.

"[T]he 1860 Act [giving complete discretion to the jury to determine whether an acquitted defendant shall be liable for the costs of prosecution] is invalid under the Due Process Clause because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs. . . .

"It is well established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits *or leaves judges and jurors free to decide, without any legally fixed standards,* what is prohibited and what is not in each particular case. [Citations.] This 1860 Pennsylvania Act contains no standards at all, nor does it place any conditions of any kind upon the jury's power to impose costs upon a defendant who has been found by the jury to be not guilty of a crime charged against him. . . . *Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the promise that the*

law must be one that carries an understandable meaning with legal standards that courts must enforce. This state Act as written does not even begin to meet this constitutional requirement." (Italics added.) (Giaccio v. Pennsylvania, supra, 382 U.S. 399, 402-403.)

The Supreme Court exposed the constitutional infirmity in the trial court's interpretation of the statute, expressed in its instruction, that the jury could impose costs on an acquitted defendant if it found him guilty of "'some misconduct less than the offense which is charged but nevertheless misconduct of some kind as a result of which he should be required to pay some penalty short of conviction [and] his misconduct has given rise to the prosecution.'" Speaking for the majority Justice Black said, "It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as 'misconduct,' . . . If used in a *statute* which imposed forfeitures, punishments or judgments for costs, such loose and unlimiting terms would certainly cause the statute to fail to measure up to the requirements of the Due Process Clause. And these terms are no more effective to make a statute valid which standing alone is void for vagueness." (*Id.* at p. 404.) *Giaccio* thus makes clear that the void-for-vagueness doctrine is not limited to laws regulating conduct or prescribing guilt-determination procedures, but rather applies as well to criminal statutes stipulating penalties and the procedure for their imposition.

That *Giaccio* involved an acquitted defendant does not render the decision inapposite here. The two concurring Justices, Stewart and Fortas, would have explicitly rested the decision on the narrow ground that the due process clause prohibits a state from imposing a penalty on an accused whom the jury has found not guilty of the offense

charged. (*Id.* at p. 405.) Justice Black, speaking for himself and five other Justices, however, nowhere attaches any importance to the fact of acquittal; he makes clear that the vice of the statute (and its application by the trial court pursuant to instructions formulated in terms of "misconduct") lies in its "vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs." (*Id.* at p. 402.) *Giaccio* therefore stands at least for the proposition that a jury may not be given absolute discretion to determine whether a defendant will or will not receive a specific type of penalty.

We cannot agree with the position taken in Justice Burke's opinion (see ditto opn., p. 18) that the Supreme Court's reference to jury discretion under indeterminate sentencing laws in footnote 8 of the opinion renders *Giaccio* inapplicable to the present issue. In footnote 8 the court states: "In so holding we intend to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." (*Id.* at p. 405.)

First, footnote 8 demonstrates the court's recognition that the majority rationale does apply to the question of the constitutionality of jury discretion in sentencing. Second, the footnote disclaims no more than the general implication that the decision automatically renders *all* jury discretion in sentencing unconstitutional; the footnote, that is, merely states that *some* jury discretion in sentencing is consistent with the demands of the due process clause.

Finally, and most importantly, the footnote refers to those state practices leaving to the jury the discretion to fix punishment "within legally prescribed limits." (*Id.* at

p. 405, fn. 8.) Footnote 8 thus relates to those sentencing procedures in which the jury performs a function similar to that performed by the Adult Authority (Pen. Code, §§1168, 3020-3024.5, 5075-5082) and the trial judge (e.g., Pen. Code, §§17, 1203) in California.[11] The purpose of footnote 8, then, was to indicate that the decision did not cast doubt upon the constitutionality of typical indeterminate sentencing procedures in which a jury—or a judge or administrative body—exercises discretion, *within legally prescribed limits*, to determine the extent of the incarceration of convicted defendants.[12]

The United States Supreme Court expressly recognized in *Witherspoon* that the penalty determination in a capital case does not constitute a typical form of sentencing discretion. *"It should be understood that much more is involved here than a simple determination of sentence."* (Italics added.) (391 U.S. 510, 521, fn. 20.) *Witherspoon* thus requires that we reexamine our prior decisions in People v. Hill (1967) 66 Cal.2d 536, and People v. Seiterle (1966) 65 Cal.2d 333. These cases erroneously declared that *Giaccio* exempted *all* forms of sentencing discretion, regardless of the nature of the choice or the penalties involved, from the holding of that case that a jury cannot constitutionally impose a penalty in the absence of standards.

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[11] A minority of states leave the function of fixing punishment within the statutory limits to the jury rather than to the trial judge or an administrative body. On the jury's sentencing discretion in felony cases generally, see Note, *Statutory Structures for Sentencing Felons to Prison* (1960), 60 Colum.L.Rev. 1134, 1154-1157.

[12] We explain in the fourth part of our discussion, *infra*, that unconstitutionality of the penalty trial because of the absence of standards does not cast into doubt the constitutionality of the clearly distinguishable sentencing discretion exercised by the trial judge in California in non-capital cases.

Appendix B

III. *The absence of any prescribed standards in the administration of the death penalty deprives the capital defendant sentenced to death of his right to equal protection of the laws in violation of the Fourteenth Amendment.*

Insofar as they both interdict arbitrary laws and procedures, the equal protection and due process clauses of the Fourteenth Amendment overlap. The "constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' *Chambers* v. *Florida* (1940) 309 U.S. 227, 241." (Griffin v. Illinois, supra, 351 U.S. 12, 17; Douglas v. California, supra, 372 U.S. 353, 356-358; Truax v. Corrigan (1921) 257 U.S. 312, 331-333; Yick Wo v. Hopkins (1886) 118 U.S. 356, 367-368.)

The unguided discretion of the trier of fact to decide that a convicted capital defendant shall suffer death rather than life imprisonment violates the basic guarantee of the equal protection clause that the legal process must provide for evenhanded justice. (McLaughlin v. Florida (1964) 379 U.S. 184, 194; Skinner v. Oklahoma (1942) 316 U.S. 535, 541; Yick Wo v. Hopkins, supra, 118 U.S. 356, 369.) Such discretion also violates the essential corollary of this proposition that a statute abridges this guarantee if it confers upon the jury "a naked and arbitrary power" to impose a criminal penalty on the basis of any principle or no principle. (Yick Wo v. Hopkins, supra, 118 U.S. at p. 366.)

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The equal protection clause prohibits the arbitrary selection of a class of individuals for the imposition of a special burden. It requires as a minimum that legislative classifications be rationally related to a legitimate governmental purpose. (Loving v. Virginia (1967) 388 U.S. 1, 8-9; Rinaldi v. Yeager (1966) 384 U.S. 305, 308-309; Blumenthal v. Board of Medical Examiners (1962) 57 Cal.2d 228, 233; Perez v. Sharp, supra, 32 Cal.2d 711, 714.) "The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same" (Tigner v. Texas (1940) 310 U.S. 141, 147) or prohibit "legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated." (Barbier v. Connolly (1885) 113 U.S. 27, 32.) "But arbitrary selection can never be justified by calling it classification." (Gulf, Colorado & Santa Fe Ry. Co. v. Ellis (1897) 165 U.S. 150, 159; McLaughlin v. Florida, supra, 379 U.S. 184, 190.)

The mandate of the equal protection clause that the law "affect alike all persons similarly situated" requires that classifications imposing different treatment on selected groups of persons derive, not from whim or caprice, or hostility or favoritism towards particular individuals or groups, but from legitimate legislative objectives. (Truax v. Corrigan, supra, 257 U.S. 312, 332-333; see generally Tussman & tenBroek, *The Equal Protection of the Laws* (1949) 37 Cal.L.Rev. 341, 344-347, 357-361.) When such a classification does not bear at least a rational relation to a legitimate legislative purpose, or when the legislation fails to reveal any legitimate purpose in relation to which the classification can be justified, then the legislation fails because it creates an "invidious discrimination." (McLaughlin v. Florida, supra, 379 U.S. 184, 190, 194; Douglas

v. California, supra, 372 U.S. 353, 356; Skinner v. Oklahoma, supra, 316 U.S. 535, 541.)

In order to determine whether legislative classifications imposing special burdens create an invidious discrimination and thus run afoul of the equal protection clause, we must consider not only the basis of the classification and the purported justifying legislative purpose but also the nature of the legislation and the area of human conduct it regulates. (Smith v. Cahoon (1931) 283 U.S. 553, 567; Tussman & tenBroek, supra, 37 Cal.L.Rev. 341, 372-373.) In cases involving economic regulations, "the Court has merely asked whether there is any rational foundation for the discrimination, and has deferred to the wisdom of state legislatures." (Loving v. Virginia, supra, 388 U.S. 1, 9.) But in cases in which "fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." (Harper v. Virginia Bd. of Elections (1966) 383 U.S. 663, 670.)[18]

Thus, in Skinner v. Oklahoma, supra, 316 U.S. 535, the United States Supreme Court struck down as violative of the equal protection clause the Oklahoma Habitual Criminal Sterilization Act because it included within the class

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[18] A law involving a "fundamental" right (e.g., the right to vote or the right to marry) or employing a "suspect" classification (e.g., race or ancestry), "even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." (McLaughlin v. Florida, supra, 379 U.S. 190, 196; see also, e.g., Loving v. Virginia, supra, 388 U.S. 1 (right to marry); Baxstrom v. Herold (1966), 383 U.S. 107 (right to a hearing before civil commitment at expiration of a prison sentence); Cox v. Louisiana (1965), 379 U.S. 536 (right to freedom of speech); Perez v. Sharp, supra, 32 Cal.2d 711 (right to marry).)

of three-time felons subject to the act those guilty of larceny but arbitrarily excluded those guilty of embezzlement. The following reasoning of the Supreme Court in *Skinner* directly applies to the question whether the state may constitutionally confer upon a jury the absolute discretion to decide that a convicted capital defendant shall be deprived of his life rather than undergo impairment of his liberty by imprisonment for life: "[I]f we had here only a question as to a State's classification of crimes, such as embezzlement or larcency, no substantial federal question would be raised. . . .

"But the instant legislation runs afoul of the equal protection clause, though we give Oklahoma that large deference which the rule of the foregoing cases requires. We are dealing here with *legislation which involves one of the basic civil rights of man. . . . There is no redemption for the individual whom the law touches.* Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters . . . merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, *lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals* in violation of the constitutional guaranty of just and equal laws. The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' *Yick Wo* v. *Hopkins,* [supra] 118 U.S. 356, 369. *When the law lays an unequal hand on those who have committed intrinsically the same quality of offense* and sterilizes one and not the other, it has made as . . . *invidious a discrimination* as if it had selected a particular race or nationality for oppressive treatment." (Italics added.) (316 U.S. at pp. 540-541.)

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The present adminstration of the death penalty in California constitutes an even more flagrant violation of the defendant's right to equal protection of the laws than the procedures under Oklahoma's Habitual Criminal Sterilization Act in *Skinner*. Here the defendant suffers not only an irreparable deprivation of his right to procreate; he suffers a deprivation of *all* "the basic civil rights of man," even life itself. Here, as in *Skinner*, we have "no redemption for the individual whom the law touches." We must therefore follow the constitutional mandate and "strictly scrutinize" the distinction which the state permits the trier of fact to draw between those convicted capital defendants who receive the death penalty and those who suffer life imprisonment, "lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."

The The "strict scrutiny" required by *Skinner* is not necessary to reveal the inherent invidious discrimination against those capital defendants who receive the death penalty as distinguished from those who receive life imprisonment. In *Skinner*, the distinction rested on an arbitrary classification which permitted invidious discrimination; here, the distinction rests on no classification at all. In a comparable legal situation, in a case not involving the awful penalty of death but the granting of a permit to exhibit motion picture film, we very recently held an ordinance unconstitutional because it totally lacked standards. In Burton v. Municipal Court (1968) 68 A.C. 720, 728, pointing to the decisions holding unconstitutional statutes and ordinances with inadequate standards, we said: "*A fortiori* an ordinance is unconstitutional *if no standards*

whatever are set forth to circumscribe the discretion of officials in granting or denying licenses. [Citations.]" (Italic added.)

The procedure under sections 190 and 190.1, providing no classificatory criteria whatsoever, permits the trier of fact *arbitrarily* to determine whether particular convicted capital defendants should suffer death rather than life imprisonment. Such absence of classification renders the current procedure insufficient to satisfy even the *minimum* requirement of the equal protection clause that different treatment of persons prima facie similarly situated must bear some rational relation to a discernible legislative purpose. In failing to provide any rational basis upon which to justify an imposition of the death penalty on those particular convicted capital defendants sentenced to death rather than life imprisoment, sections 190 and 190.1 make "as . . . invidious a discrimination" against those upon whom the trier of fact imposes the death penalty "as if [they] had selected a particular race or nationality for [that] oppressive treatment." (Skinner v. Oklahoma, supra, 316 U.S. 535, 541.) "It is clearly unconstitutional to enable a public official [let alone an ad hoc group of 12 individuals] to . . . engage in invidious discrimination among persons or groups . . . by use of a statute providing a system of broad discretionary . . . power." (Cox v. Louisiana, supra, 379 U.S. 536, 557; Yick Wo v. Hopkins, supra, 118 U.S. 356, 366-363). Thus, the trier of fact's absolute power to impose the death penalty on a convicted capital defendant violates the basic interdictment of the equal protection clause that no person shall hold "a naked and arbitrary power" to make invidious discriminations against another. (Yick Wo v. Hopkins, supra, 118 U.S. at pp. 366-368.)

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To meet the above propositions, Justice Burke's opinion (ditto opn., pp. 15-17) cites a number of cases from other jurisdictions which we do not find persuasive. Only two of the cases involving the lack-of-standards contention were decided after *Witherspoon* and *Jackson:* Maxwell v. Bishop (8th Cir. 1968) 398 F.2d 138, and State v. Forcella (N.J. 1968) 245 A.2d 181. The court in *Maxwell,* rejecting a constitutional challenge to the Arkansas statute, was "not convinced that the absence of expressly stated standards in the statute requires that it be forthwith condemned constitutionally. . . . [The jury's] choice between capital punishment and life imprisonment . . . is not startlingly or shockingly different from the situation where choice of punishment within statutorily prescribed limits is for the judge." (398 F.2d at p. 149.) But as we shall explain in part IV, *infra,* the gravity of the decision rendered at the penalty trial as contrasted with the consequences of other sentencing decisions results in a constitutionally significant difference between these decisions.

In *Forcella* the New Jersey Supreme Court declined to overrule its earlier opinion in State v. Johnson (N.J. 1961) 168 A.2d 1, app. dism. 368 U.S. 145, cert. den. 368 U.S. 933 (discussed *infra*). It suggested that the statute relating to the death penalty did not lend itself to "specific standards"; that "although the Constitution may require a standard whenever one is feasible and serviceable, it cannot follow that government must be denied all powers which defy a definitive statement of the basis of their exercise"; hence the matter must be resolved by "a sound discretion." (State v. Forcella, supra, 245 A.2d 181, 194.) But, as we shall set out in more detail *infra,* due process requires that death not be dealt out irrationally and with-

out standards; due process requires reasoned justice; if society or the Legislature cannot "feasibly" set out tests as to why one capital offender should die and the other live, the unresolved issue should not be foisted upon the trier of fact so that it inevitably must decide the issue arbitrarily. Due process can never be sacrificed upon the altar of the difficulty of its articulation; reasoned justice should not be abandoned to chance.

In another lack-of-standards case cited in Justice Burke's opinion, Chatterton v. Dutton (Ga. 1967) 154 S.E.2d 213, cert. den. 389 U.S. 914, the Georgia court, in holding that the absence of standards did not deny due process to the capital defendant, merely quoted the United States Supreme Court as stating that: "The requirements of the Fourteenth Amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular State, and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government." (154 S.E.2d 213, 215.) That sentence is taken out of context from Minder v. Georgia (1902) 183 U.S. 559, 562. In the latter case the defendant argued not that the manner in which the law would affect him emanated from an arbitrary and unlimited discretion, but that the state statute violated the equal protection clause because it differed from the statutes in force in other states. In dismissing the equal protection clause contention, the *Chatterton* court merely reiterated the non sequitur that since all defendants convicted of first degree murder are subject to the same penalty procedure, the law treats alike all those within the same class.

The "reasoning" of the Georgia court in *Chatterton* begs the question by refusing to recognize that the issue

is whether the class of capital offenders may be arbitrarily *subclassified* into the classes of those who do and those who do not suffer death as the penalty. Offering no logical rationale for the rejection of petitioners' Fourteenth Amendment claims, *Chatterton* cannot therefore be relied upon as authority for the proposition that a procedure which vests arbitrary power in the trier of fact to determine the question of life and death does not run afoul of the Fourteenth Amendment.

An additional federal case rejecting the lack-of-standards contention which Justice Burke's opinion cites, In re Ernst's Petition (1961) 294 F.2d 556, 560-561, rests upon three bases that we cannot accept. The first is its reliance upon tradition to uphold the absolute discretion of the jury in sentencing. As we explained supra, however, the longevity of a practice can never insulate it from constitutional scrutiny; "due process" is an evolving concept which is subjected to continuous re-analysis in light of society's development and maturation. (Wolf v. Colorado (1949) 338 U.S. 25, 27; see also, Pointer v. Texas (1965) 380 U.S. 400, 403-406; Malloy v. Hogan, supra, 378 U.S. 1, 4-6; Gideon v. Wainright (1963) 372 U.S. 335, 339; Rochin v. California (1952) 342 U.S. 165, 168-172; see generally, Kadish, *Methodology and Criteria in Due Process Adjudication: A Survey and Criticism* (1957) 66 Yale L.J. 319.)

The second basis of *Ernst* rests upon the Supreme Court's apparent prior approval of a federal penalty provision applicable to defendants convicted of first degree murder which is analogous to the provision struck down in *Jackson*. The third basis—that the delegation of discretion to the jury to decide life or death allows a mitigation of the severity of capital punishment—was ex-

plicitly rejected as a justification for an unconstitutional penalty procedure in *Jackson*.

The oldest federal case relied upon in Justice Burke's opinion, Ex parte Sullivan (9th Cir. 1936) 83 F.2d 796, 798, offers us no more than the bare statement: "Appellant contends that the submission to the jury of the question whether or not the defendant, in the event he was convicted of first degree murder, should be sentenced to life imprisonment or to death was a violation of his rights under the Fourteenth Amendment to the Constitution of the United States. There is no merit in this contention." (Cf. People v. Mason, supra, 54 Cal.2d 164, 169, and other cases discussed *infra*, at fn. 14.)

State v. Latham (Kan. 1962) 375 P.2d 788, 798-799, cited in Justice Burke's opinion, rejects the equal protection point on the ground that the question of the proper penalty must be and was resolved by the Legislature, and reads standards into a statute which literally confers complete discretion. *Latham* contains no discussion, however, of why a provision for absolute discretion in determining the penalty in capital cases *without any standards* does not subject the capital defendant to a power of unconstitutional and arbitrary decision. To answer the lack-of-standards contention in terms of the Legislature's power to delegate sentencing discretion, which ignores the question whether that discretion must be circumscribed, simply begs the issue.

Finally, State v. Johnson, supra, 168 A.2d 1, app. dism. 368 U.S. 145, cert. den. 368 U.S. 933, and State v. Walters, (Conn. 1958) 138 A.2d 786, app. dism. and cert. den. 358 US. 46, also do not support the refusal to reconsider the lack-of-standards contention. In *Johnson*, the court relied upon the existence of similar statutes in a majority of

American jurisdictions, the lack of any case holding such a statute unconstitutional, and, most importantly for our consideration here, the fact that the jury's discretion to determine the death penalty was not "absolute" under the New Jersey system, although the limitation on that discretion—that the jury must act to further "the interests of justice"—was surely more apparent than real. (168 A.2d at pp. 10-11.) And in *Walters* the court also relied upon a similar provision in a federal statute conferring discretion upon the jury, and argued that for special historical reasons, not present in California, the jury was exercising the clemency power.[14]

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[14] Similarly, the prior decisions of our court rejecting the lack-of-standards argument were all decided before *Witherspoon* and *Jackson*, and therefore their current precedential value is questionable.

The earliest case rejecting the lack-of-standards contention, People v. Mason, supra, 54 Cal.2d 164, 169, stated merely: "Defendant contends finally that it is a denial of due process of law to permit the jury to fix the penalty without prescribing standards to guide the exercise of its power. It is settled, however, that the selection of life imprisonment or death as the punishment for first degree murder is within the absolute discretion of the jury. (*People* v. *Green*, 47 Cal.2d 209, 232; *People* v. *Friend*, 47 Cal.2d 749, 764-768; *People* v. *Jones*, 52 Cal.2d 636, 652.)"

The three cases cited in *Mason* clearly hold that the trier of fact has absolute discretion to determine whether a defendant convicted of first degree murder shall suffer death or life imprisonment. But not one of the cases passes on the constitutionality of the administration of the death penalty in the absence of prescribed standards to guide the determination of the trier of fact.

Most recently, in People v. Hill, supra, 66 Cal.2d 536, 569, we disposed of the Fourteenth Amendment contention as follows: "Section 190.1 places the determination of life or death within the discretion of the trier of fact. [Citations.] The jurors were fully instructed by the court as to the matters which they might consider and the valuations they were required to make in approaching the threshold of their final judgment. We have heretofore declared that section 190.1 is not unconstitutionally vague." (*People* v.

The superficial discussions of these cases cannot justify our failure to reassess the lack of standards in the penalty trial in the light of well recognized constitutional principles.

Seiterle (1966), 65 Cal.2d 333, 340-341; see also *People* v. *Shipp* (1963), 59 Cal.2d 845, 853; *People* v. *Duncan* (1959), 51 Cal.2d 523, 529.)"

A review of the three cases cited by *Hill* for the proposition that we have hitherto declared constitutional the vesting of absolute discretion in the jury by sections 190 and 190.1 of the Penal Code reveals the terseness and inadequacy of the consideration which we have granted to the contentions now urged. *Seiterle*, the only case in which this court commented upon the Fourteenth Amendment "vagueness" ground now fully presented, fails to explain why the complete lack of standards in the present administration of the death penalty does not deprive capital defendants sentenced to death of due process of law. It rests on an incorrect interpretation of the first United States Supreme Court case (Giaccio v. Pennsylvania, supra, 382 U.S. 399) that recognizes that the "void-for-vagueness" doctrine applies to criminal statutes imposing penalties as well as to criminal statutes prescribing conduct sanctioned by penalties. (See discussion supra, p. 26 et seq.)

The discussion of the constitutional issue in *Seiterle* is limited to the following: "Defendant argues in effect that Penal Code section 190.1 is unconstitutional because it imposes upon the trier of facts the duty of selecting the penalty without specifying any guidelines or standards to be followed. The constitutionality of section 190.1, however, has previously been upheld. (*People* v. *Shipp*, 59 Cal.2d 845, 853; *People* v. *Duncan*, 51 Cal.2d 523, 529.) *Giaccio* v. *Pennsylvania*, 382 U.S. 399, cited by defendant, is not contrary to the cited cases." (65 Cal.2d at p. 340.) The court in one sentence then gives an overly narrow statement of the holding in *Giaccio* and concludes its discussion of the constitutional issue with a citation of footnote 8 in the *Giaccio* opinion which, as we explained above, requires a diametrically opposed reading of the case.

The two cases relied upon in *Hill* and *Seiterle*—namely, People v. Shipp, supra, 59 Cal.2d 845, and People v. Duncan, supra, 51 Cal.2d 523—do not support the conclusion that the absence of any prescribed standards to delimit the trier of fact's discretion in determining the penalty does not violate the capital defendant's Fourteenth Amendment rights. In *Shipp* the defendant contended that if the separate penalty trial provided for by section 190.1

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The applicability of those principles to the administration of the death penalty has become clear beyond doubt by the very recent cases of the United States Supreme Court which have obliterated the old distinction between the legal process of determining the penalty in a capital case and that of

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cannot be waived, then the section is unconstitutional. The court merely responded: "The provisions of section 190.1 establishing the bifurcated trial are mandatory, and their constitutionality is settled. (*People* v. *Love*, 56 Cal.2d 720, 725; *People* v. *Corwin*, 52 Cal.2d 404, 407; *People* v. *Duncan*, 51 Cal.2d 523, 529; *People* v. *Feldkamp*, 51 Cal.2d 237, 240-241; *People* v. *Ward*, 50 Cal.2d 702, 706-711; *Ward* v. *State of California* (9th Cir. 1959), 269 F.2d 906.)" (59 Cal.2d 845, 853.) And in *Duncan*, relied upon in *Shipp*, the court merely stated: "There is no merit in defendant's contentions that section 190.1 of the Penal Code, adopted in 1957, which provides for separate trials of the issues of guilt, penalty, and sanity, is unconstitutional. (*People* v. *Feldkamp, ante*, p. 237; *People* v. *Ward*, 50 Cal.2d 702; *cf. People* v. *Cordova*, 14 Cal.2d 308, 309 et seq.)" (51 Cal.2d 523, 529.)

None of the cases relied upon in *Shipp* and *Duncan* raised the issue of the constitutionality of conferring absolute discretion on the trier of fact to determine whether a convicted capital defendant shall suffer death or life imprisonment. In People v. Love (1961), 56 Cal.2d 720, 725, the court stated only that: "Defendant contends that the trial court denied him due process by permitting the prosecutor to open and close the penalty trial and the argument to the jury. This procedure was expressly approved in *People* v. *Corwin*, 52 Cal.2d 404, 407." People v. Corwin (1959), 52 Cal.2d 404, did not involve any constitutional attack on the administration of the death penalty. *Corwin* held that the trial court did not err in permitting the prosecutor to both open and close the argument in the penalty trial. (52 Cal.2d at p. 407.) The only constitutional issue involved in People v. Feldkamp (1958) 51 Cal.2d 237, People v. Ward (1958), 50 Cal.2d 702, and Ward v. State of California (9th Cir. 1959), 269 F.2d 906, was whether the application of section 190.1 to a defendant convicted of a murder committed prior to the enactment of that section violated the constitutional prohibition against ex post facto laws. Finally, the only constitutional contention urged in People v. Cordova (1939), 14 Cal.2d 308, related to the procedure for the determination of guilt and sanity when the defendant enters dual pleas of not guilty and not guilty by reason of insanity.

determining guilt. We cannot, by retreat into history and tradition, justify ignoring "that basic requirements of procedural fairness" (Witherspoon v. Illinois, supra, 391 U.S. 510, 521, fn. 20) proscribe the imposition of the death penalty pursuant to a power of arbitrary decision.

IV. *Recognition of the unconstitutionality of sections 190 and 190.1 of the Penal Code does not affect the constitutionality of other forms of sentencing discretion in California.*

In its potential for abuse the absolute discretion conferred upon the trier of fact by sections 190 and 190.1 far outstrips any other form of sentencing discretion exercised under California law. As the United States Supreme Court recognized in *Witherspoon*, "much more is involved [in the trier of fact's determination whether the convicted capital defendant shall receive death or life imprisonment] than a simple determination of sentence." (391 U.S. 510, 521, fn. 20.) Two major, and constitutionally significant, reasons explain this disparity between the discretion exercised in the death penalty trial and that exercised in other sentencing situations. The first stems from the nature and gravity of the decision rendered by the trier of fact in the penalty trial as contrasted with that of other discretionary sentencing decisions. The second arises out of the lack of any recognized purpose for establishing this standardless discretion in adjudging the death penalty as contrasted with the inherent presence of standards in the penological regime of rehabilitation that circumscribe all other forms of sentencing discretion in California.

Skinner v. Oklahoma, supra, 316 U.S. 535, holds that the constitutionally requisite safeguards to prevent abuse of

discretion, and therefore the constitutionally requisite degree of specificity of standards to circumscribe the exercise of discretion, depend upon the right at stake and the irrevocability of the decision impairing that right. That the Constitution demands clear and definite legislatively prescribed standards to control the exercise of discretion to impair irrevocably the most fundamental right upon which all other rights depend, does not, therefore, necessarily imply that similar standards to control the exercise of other forms of discretion affecting less fundamental rights in a more revocable manner are constitutionally required. Hence, in determining the constitutional necessity for explicit legislatively prescribed standards to limit the exercise of delegated sentencing discretion, we must first focus upon the nature and gravity of the decision rendered by the delegatee of the sentencing discretion.

The trier of fact in the penalty trial renders the most drastic judgment a state can impose: whether to deprive a person of his life. Yet this decision lies in the absolute and unfettered discretion of the trier of fact. The trier of fact must select between two legislatively neutral alternative kinds of punishment. (See People v. Green, supra, 47 Cal.2d 209, 218.) Not even implicit principles, built into the statutory scheme, serve to guide or control this discretion. Such discretion, as we explain below, is *sui generis*. In all other cases of sentencing discretion, in which a less fundamental right is less irrevocably affected, the law furnishes standards to guide and control the exercise of the discretion.

Thus the anomaly of the death penalty trial as it is now conducted is that it proceeds in reverse of the principle of *Skinner*. In less vital sentencing decisions, such as the determination of whether a crime should be classified as a

felony or misdemeanor (see ditto opn., p. 18), the statutes and the decisions set forth a purpose and policy; guidelines may be derived from such purpose and policy. But when we come to the tremendous issue of whether the capital defendant should live or die we find no purpose, policy, or basic guidelines at all. We subject the greatest penalty to administration without any safeguards but we protect the *lesser* rights by such safeguards; we thereby invert the constitutional principle of *Skinner*.

Justice Burke's opinion erroneously attempts to compare the power of the trial court to punish certain crimes as either felonies or misdemeanors with the absolute discretion conferred upon the trier of fact by sections 190 and 190.1. The nature and gravity of the two procedures significantly differ, and the sentencing discretion exercised by the trial judge in making such a decision demonstrates no similar absolute discretion unguided by legislative purpose.

The only similarity between the trial judge's power under section 17 of the Penal Code to decide that a felony "be deemed a misdemeanor for all purposes after a judgment [imposing a punishment] other than imprisonment in the state prison," and the trier of fact's power under sections 190 and 190.1, is that both involve a selection between different kinds, rather than merely varying degrees, of punishment. Since the point at which a difference in kind shades into a difference of degree always remains debatable, however, this prima facie similarity can also be as accurately described as a difference.[15] But, regardless of

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[15] Imprisonment in the county jail clearly differs significantly from imprisonment in a state prison. Moreover, "when a crime is punishable by imprisonment in the state prison, or in the discretion of the court by imprisonment in the county jail, the actual punishment ordered is the test [for characterizing the crime as a

whether the trial judge has the power to select among kinds of punishment or only to determine degrees of deprivation of liberty, the nature and purpose of the discretion he exercises, as well as the gravity of the decision he renders, demonstrate the significant differences between section 17 and sections 190 and 190.1.

First, although sections 190 and 190.1 require the trier of fact to select between two legislatively neutral alternative penalties, section 17 does not confer discretion on the trial judge to select between two such neutral alternative penalties. The Legislature does express a preference in section 17 and provides in relevant part that " 'when a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment . . . in the state prison. . . .' This language has been construed uniformly to mean that the *felony aspect of the crime remains* until sentence is imposed for a misdemeanor and if no sentence is ever pronounced the offense remains a felony at all times." (Italics added.) (People v. Finley (1963) 219 Cal.App.2d 330, 340-341.)[16]

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felony or a misdemeanor]." (Meyer v. Superior Court (1966), 247 Cal.App.2d 133, 137.) Thus the consequences of undergoing the two different penalties also significantly differ. On the other hand, both obviously involve deprivations of liberty rather than of life and can therefore be described as two degrees of the same kind of punishment. And, of course, in terms of differences of severity, the two imprisonments are quite close compared to the difference faced by the convicted capital defendant.

[16] Several cases make clear that the "legal" sentence for a felony-misdemeanor is the felony sentence prescribed by the Legislature unless and until the trial court imposes a misdemeanor sentence. Thus, for example, the offense remains a felony for the purpose

Second, the trial judge in exercising the discretion conferred by section 17, like the Adult Authority in determining questions of extent of incarceration and parole (see People v. Morse, supra, 60 Cal.2d 631, 642-644; In re Lee (1918) 177 Cal. 690), acts within the penological system of rehabilitation. The Legislature has not failed here, as it has with sections 190 and 190.1, to indicate its purpose in conferring discretion. This purpose, which serves to guide the exercise of the trial judge's discretion, is implicit both in section 17 itself and in the general statutory scheme of sentencing discretion.

The purpose of the trial judge's sentencing discretion under section 17 is to impose a misdemeanor sentence in those cases in which the rehabilitation of the convicted defendant either does not require, or would be adversely affected by, incarceration in a state prison as a felon. Thus, the court in Meyer v. Superior Court, supra, 247 Cal.App.2d 133, 140, recognized that "in conferring upon the court the power [under section 17 as amended in 1963 (Stats. 1963, ch. 191, §1, pp. 2169-2170)] to declare an offense to be a misdemeanor after it has suspended imposition of judgment or sentence, the Legislature evidently intended to enable the court to reward a convicted defendant who demonstrates

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of the statute of limitations (Doble v. Superior Court (1925), 197 Cal. 556, 576-577); when imposition of sentence is suspended the court can set the term of probation at the maximum possible felony term, and can thereafter revoke probation and pronounce a misdemeanor sentence even after expiration of the maximum misdemeanor term (People v. Lippner (1933), 219 Cal. 395, 403); and in a homicide prosecution, evidence that the killing was in the perpetration of an alternatively punishable offense supports a determination that the homicide was second degree murder in the perpetration of a felony. (People v. Doyle (1958), 162 Cal.App.2d 158, 161.)

by his conduct that he is rehabilitated."[17] In discussing the trial court's duty under section 17 to determine "which [sentence] is the more appropriate to a given defendant," the court in People v. Smith (1968) 259 A.C.A. 923, 928, explained: "Modern penological thought is based upon the concept that punishment should fit the offender as well as the crime. Within the area delimited by constitutional and statutory restrictions, the sentencing judge has broad discretion to consider not only the offender's guilt, but also his potential for rehabilitation balanced against the community's need for protection."

Third, in addition to the legislative purpose of rehabilitation, the Penal Code (§§12, 13, and 1204) provides general procedures to guide the exercise of discretion conferred by section 17. (People v. Smith, supra, 259 A.C.A. 923, 927-928.) Although neither Constitution nor statute

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[17] The "integral and important part in the penological plan of California . . . of the probation procedures" (People v. Banks (1959), 53 Cal.2d 370, 383) further evidences the mitigating and rehabilitative purposes of the trial judge's discretion under section 17. In all cases in which a defendant convicted of a felony-misdemeanor is eligible for probation, the trial court must, *before* exercising its discretion under section 17, refer the case to a probation officer and then hear and determine the suitability of probation and in connection therewith consider the report and recommendations of the probation officer. (Pen. Code, § 1203.)

"Even in a case in which the defendant is not eligible for probation, the court may in its discretion refer the matter to the probation officer for an investigation of facts relevant to sentence (Pen. Code, § 1203). In a case in which the defendant is eligible for probation, if the court renders judgment without a reference to the probation officer, the judgment will be reversed, not for a new trial, but for the purpose of proceedings in accordance with statutory procedure. [Citations.] Reference to the probation officer in cases where the defendant is ineligible for probation is provided for in section 1203, Penal Code, and it is not an idle procedure. It furnishes a record of facts relevant to punishment, . . ." (People v. Gotto (1955), 138 Cal.App.2d 165, 168.)

establishes a right to a full-scale hearing on the question of penalty under section 1204, the cases have uniformly construed that section to afford to a defendant the right to present evidence in mitigation of his punishment. (See, e.g., People v. Valdivia (1960) 182 Cal.App.2d 145, 148 (discretion to grant or deny probation under Pen. Code, §1203); In re Klein (1961) 197 Cal.App.2d 58, 65 (discretion to sentence for a felony-misdemeanor under Penal Code section 17); In re Miller, supra, 176 Cal.App.2d 75, 78-79 (discretion under Penal Code section 17).). "[S]ection 1204 of the Penal Code 'requires the court in determining the consequences of guilt to receive *evidence* [with the exception of the probation report provided for by section 1203] either in mitigation or aggravation of the punishment to be imposed. . . . The statute demands that the duty of determining the question of aggravation or mitigation of punishment be performed with scrupulous fairness to the defendant.'" (In re Miller, supra, 176 Cal.App.2d 75, 78-79, quoting People v. Neal (1950) 97 Cal.App.2d 668, 676, a case involving the trial judge's discretion to sentence a defendant convicted of more than one felony either concurrently or consecutively under Penal Code section 669; see also People v. Surplice (1962) 203 Cal.App.2d 784, 792.)

Fourth, and most important, the discretion of the trial judge under section 17, unlike that of the trier of fact under sections 190 and 190.1, is not final and "absolute." The convicted and sentenced defendant may seek appellate review on the ground of "abuse of discretion." (People v. Smith, supra, 259 A.C.A. 923, 928; People v. Surplice, supra, 203 Cal.App.2d 784, 791-792; In re Miller (1959) 176 Cal.App.2d 75, 78-79.)

For the above reasons we submit that the type of sentencing discretion vested in the trial court by section 17

constitutes "discretion in the legal sense of that term" as opposed to the "naked and arbitrary power" (Yick Wo v. Hopkins, supra, 118 U.S. 356, 366) conferred upon the trier of fact by sections 190 and 190.1. "Legal" or "judicial" discretion "implies absence of arbitrary determination, capricious disposition or whimsical thinking. . . . To exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision." (People v. Surplice, supra, 203 Cal.App.2d 784, 791.)

We summarize the reasons why Penal Code sections 190 and 190.1 violate due process of law. The absence of standards in the penalty trial confers absolute discretion upon the judge or jury to decree death; the capital defendant suffers death by the exercise of arbitrary power. The defendant does not know how to prepare a defense for such a trial because it lacks definable issues; this appellate court cannot intelligently review it. If the imposition of the penalty is an absolute exercise of discretion, we lack any standard of review; the judgment of death lies within the mystique of the untouchable. Indeed, in the face of the fact that "the jury must decide the question [of life or death] without benefit of guideposts, standards or applicable criteria" (People v. Terry (1964) 61 Cal.2d 137, 154), this court has described the speculative and illusory nature of the penalty trial and of its reviewability. We said, "To attempt to assess the effect of error in this legal vacuum is to superimpose one untestable surmise upon another. We must not pile conjecture upon conjecture and posit the decision of life or death upon a pyramid of guesses." (*Id.* at p. 154.)

In its potential for abuse the power conferred upon the trier of fact by sections 190 and 190.1 thus surpasses all

other forms of sentencing discretion. The defendant sentenced to death cannot obtain judicial relief on the ground of abuse of discretion because the lack of standards in the administration of the death penalty has rendered proof of such "abuse" in this context impossible.

As the United States Supreme Court recognized in the landmark case of Yick Wo v. Hopkins, supra, 118 U.S. 356, 369-370, "It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, ... For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

If constitutional principle requires that standards be followed by the trier of fact in reaching its decision in all other legal proceedings, even to the matter of payment of the costs of a trial, and if the United States Supreme Court has only recently ruled that the procedure for the death penalty must be founded upon "basic requirements of procedural fairness," the requirement for standards applies to Penal Code sections 190 and 190.1. To permit a judge or jury to decree a death sentence when no stan-

dard, policy, or purpose explains why one capital defendant should be spared and another executed, and thus to sanction an arbitrary taking of life, is an enormous deprivation of due process and equal protection of the laws.

Although Justice Burke's opinion assures us that the emotional amalgam of the jurors' reactions as to the penalty should be upheld as an expression of the "conscience of the community," the rhetoric hardly obscures the reality. That there is no "conscience of the community" which can distinguish between those capital defendants who should suffer the death penalty and those who should be spared finds graphic illustration in the in-depth statistical study of Hans Zeisel, "Some Data on Juror Attitudes Towards Capital Punishment" (1968) Center for Studies in Criminal Justice, University of Chicago Law School. After demonstrating that he can find no decisive factors which account for the infliction of the penalty, Zeisel concludes: "In the end the task is one of deciding who, among those convicted of capital crimes, is to die. Whatever the differences on which this decision hinges, they remain demeaningly trivial compared to the stakes. *The discretionary use of the death penalty requires a decision which no human should be called upon to make.*" (Fn. omitted.) (Italics added.)[18]

Sections 190 and 190.1 permit the judge or jury to decree the random doom of death without the restraining guide of reason. Neither society nor the Legislature nor the

[18] Zeisel's empirical study accords with the point made by Professor Wechsler: "A discretionary system . . . becomes inevitable with equally inevitable differences in judgment depending on the individuals involved and other accidents of time and place. Yet most dramatically when life is at stake, equality is . . . a most important element of justice." (Symposium on Capital Punishment (1961), N.Y.L.F., v. 7, pp. 250, 259.)

courts have said why one capital defendant should be selected to die and another to live. The death penalty has been supported as a punishment, a deterrent, a safety valve for revenge, an economy for the state, and on other grounds, each of which has been as hotly defended as it has been severely attacked. But no one knows which of these notions, and as many others as the mind can conjure, are accidentally seized upon by judge or jury to grant or deny life. No one knows what moves judge or jury to select a capital defendant for death. We know only that the motives and notions that deal out death are as obscure, disordered, and irrational as the statistical incidence of the death penalty itself. (Sellin, Capital Punishment (1967) 202; Kalven & Zeisel, The American Jury (1966) 436-444.) Yet the foundation rock of the law is reason; the judicial process presupposes "that its determinations are justified only when explained or explainable in reason." (Breitel, *The Law Makers* (1965) 65 Colum.L.Rev. 749, 772.)

The irrational process of decreasing death cannot be reconciled with a sense of reasoned justice; we cannot explain why or when we impose the penalty. If a civilized society cannot say why one man should be executed and another not, it does not rationally, logically, take life. Instead, it grossly denies due process of law in inflicting death upon the basis of a trial that is capricious, discriminatory, and guess-infested.

I therefore dissent from the court's ruling on the constitutionality of the death penalty, but concur in the opinion on the other issues.

TOBRINER, *J.*

WE CONCUR:

TRAYNOR, *C.J.*
PETERS, *J.*

Appendix B

[*Concurring and dissenting opinion by McComb, J.*]

For all the reasons set forth in Mr. Justice Burke's opinion, I concur in the decision of the majority of this court that the death penalty is constitutional and does not constitute cruel or unusual punishment, that Penal Code sections 190 and 190.1 are valid, and that petitioners will be afforded the services of counsel in all proceedings between the termination of their state appeals and their execution. I respectfully dissent from that portion thereof that sets aside the death penalties under the compulsion of Witherspoon v. Illinois, 391 U.S. 510 [88 S.Ct. 1770].

The circumstances that influenced the United States Supreme Court to conclude that the *Witherspoon* jury "fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments" (88 S.Ct. at 1775) did not exist in the two cases before us.

The jury that fixed the penalty at death in *Saterfield* was composed of 12 men and women, each of whom, on *voir dire* examination by defendant through his counsel, solemnly swore that he had no preference for one penalty over another or had no preconceived notion that one was more appropriate than the other. The record shows:

Juror Shaver. "Q. And as I have indicated you may be called on to decide the question of penalty. Do you have any feelings that one penalty is more appropriate than the other? A. No, sir, I don't think so."

Juror Kavanaugh. "Q. And if the question of penalty is put up to you, do you have any, start—at this point, we will put it that way, with any feelings one penalty is to be preferred over the other? A. No. Q. Do you feel that the facts of the case should determine, perhaps, what penalty is imposed? A. That is right. Q. If that question [penalty] reaches you? A. Yes."

Juror Allis. "Q. Any feeling, if that question of penalty is submitted to you, any feeling that one is to be preferred over the other? A. (Juror indicates negatively.) Q. One is more appropriate than the other? A. No."

Juror Wehrs. "Q. Do you have any feeling that there are—at least aware of any feeling that anyone who takes a human life should give his life in exchange? A. Do I have any what? Q. In other words, do you feel that anyone who kills another person should be executed? A. Based on the evidence and the instructions I received, I would make my determination from that. Q. But you have no feeling at this point? A. No preconceived feeling, no."

Juror Reynolds. "Q. If the circumstances, or the question of penalty is submitted to you, do you, at this time, have any feelings as to whether the death penalty or life imprisonment is more appropriate? A. No. Q. It is a question of the facts presented to you? A. Yes."

Juror Leasure. This juror was not specifically asked if she had any feeling that one penalty was more appropriate than another, but defense counsel asked: "Q. Mrs. Leasure, I presume you were able to hear my questions? A. Yes. Q. Any of them you feel calls for comment, as far as you were concerned? A. No."

Juror Pulliam. "Q. Do you have any feelings, at the moment, one penalty or the other is more appropriate? A. No."

Juror Hilburn. "Q. And as has also been indicated to you, it may evolve upon you to decide penalty in this case; do you have any feeling one penalty is more appropriate than the other at this time? A. No, sir."

Juror Georges. "Q. Do you have any particular feelings that, assuming the question of penalty is ever submitted to you, that one penalty is more appropriate than the other? A. No, sir."

Juror Hall. "Q. Do you have any particular feelings, if the question of penalty is ultimately submitted to you, as to what penalty is most appropriate? A. No, I don't at this time. I'd have to hear the evidence."

Alternate Juror Moss. "Q. Do you have any feelings that if the question of penalty is submitted to you, do you have any feelings, at the moment, one penalty would be more appropriate than the other? A. No."

Alternate Juror Moore. "Q. Do you have any particular feeling one penalty is more appropriate than another? A. No. Depends on the case, of course."

I do not understand how the above jurors can, by any definition, be said to be jurors "uncommonly willing to condemn a man to die." (88 S.Ct. at 1776.)

While the questions propounded by the defense to the *Anderson* jurors were not so precisely worded as in *Saterfield*, it is clear to me that, unlike *Witherspoon* (where "In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die" (ibid.)) the State of California was in search of a jury that was capable of imposing either one of the alternative penalties provided by state law based on which penalty the individual juror believed was justified. A typical question asked of prospective jurors by the prosecution time after time was, in substance: "If you felt that the merits of this case were consistent with what you would require in a proper case, you would have no hesitancy in returning the death penalty? [Answer.] And by the same token, if you felt the case on its merits didn't measure up to that which you felt was a proper case for the death penalty, you would have no hesitancy in returning a verdict of life imprisonment, is that correct? [Answer.]" Sometimes the questions were stated in reverse

order: "If you felt that the case warranted the returning of life imprisonment, you would return such a verdict, is that correct? [Answer.] And on the other hand, if you, felt the case justified the death penalty, I take it you'd return such a verdict? [Answer.]"

Again unlike *Witherspoon*, the State of California did not "entrust the determination of whether a man shall live or die to a tribunal organized to return a verdict of death." (88 S.Ct. at 1776.)

Witherspoon tells us that an acceptable impartial juror is one who will "be willing to consider all of the penalties provided by state law and no be irrevocably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings." (88 S.Ct. at 1777, fn. 21.) Yet, a jury, as a body, (who must return a unanimous verdict) does not represent a cross-section of the community and is, ipso facto, not an impartial jury, unless it is composed of some individual jurors who "harbor doubts about the wisdom of capital punishment" or who "would be reluctant to pronounce the extreme penalty." (88 S.Ct. at 1776.) These differing qualifications for an impartial individual juror and an impartial jury as a body are beyond comprehension, as 12 impartial jurors should add up to one impartial jury. Regardless of the arithmetic involved, for reasons not in issue in *Witherspoon*, that case does not, in my opinion compel setting aside the death penalty in our cases.

The majority say that they cannot conjecture that the prosecuter would have used his peremptory challenges to exclude jurors who were excused for cause by the court on its own motion. It is entirely reasonable that the People would have done so. In *Saterfield*, the People exercised only

2 of its 20 peremptory challenges in the selection of the 12 regular jurors and only one peremptory challenge in the selection of 4 alternates. In *Anderson*, the People used only 9 of its 20 peremptory challenges. Since none of the alternates served in *Anderson*, the manner of their selection is of no consequence. The defense was satisfied with the jury after the exercise of 10 peremptory challenges in *Saterfield* and 8 in *Anderson*.

Witherspoon speaks only of veniremen improperly excused for cause and repeatedly criticizes the State of Illinois for having excused *all* veniremen who harbored doubts about the wisdom of capital punishment or *all* who said they did not believe in, or were opposed to, capital punishment. There is nothing in the opinion that compels the conclusion that the death penalty would have been set aside had some lesser number been improperly excused. As the majority of this court point out, the *Witherspoon* court did not discuss the effect of the existence of remaining peremptory challenges of the prosecution. That issue was not before them.

Mr. Chief Justice Weintraub, speaking for the New Jersey Supreme Court in State v. Mathis, 245 A.2d 20, has taken the correct approach to the problem of jury selection and/or exclusion in conformity with the *Witherspoon* rule: "The thesis of *Witherspoon* is that persons who dislike capital punishment but are nonetheless capable of weighing the penalty issue constitute a segment of the community within the concept that a jury shall be drawn from a cross-section of the community. The erroneous exclusion of some jurors does not mean that the balance of the jury list was thereby deprived of representatives of that segment. Nor would it matter if no member of that segment in fact was selected. A defendant's right is to a fair opportunity to draw from

all relevant segments, and unless the erroneous rulings amounted to a denial of that opportunity, the constitutional right was not infringed. To hold otherwise would burden the judicial process with no demonstrable justification. And we think it correct to add that if the prosecution did not use all its peremptory challenges, that fact may be a relevant makeweight, for it is not unreasonable to assume that the remaining challenges would have been used, had the trial court ruled against the State on its objection to a specific juror. Here the State used only 7 of its 12 peremptory challenges." (P. 27.)

I would deny the writs.

McCOMB, *J.*